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Supreme Court, U.S.
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In The

Supreme Court of the United States

SOCIETÁ COOPERATIVA L'ARCIERE,

Petitioner,

v.

TIMOTHY J. KOPKE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case arises out of injuries sustained by a truck driver in Wisconsin while unloading a cargo container. The container had been loaded (negligently, it is alleged) in Italy by workers leased for that purpose from petitioner.

One question is presented: Does the Due Process Clause of the Fourteenth Amendment permit a Wisconsin court to exercise jurisdiction over an Italian manpower agency whose workers, while on lease to another, helped load cargo containers for placement in the stream of commerce, when the agency had no knowledge that the containers were destined for the forum, no role in shaping the chain of distribution that led them to the forum, and no other contact of any kind with the forum?

LIST OF PARTIES

The following were parties to the proceeding below:

Societá Cooperativa L'Arciere

Timothy J. Kopke

Cartiere Binda in Liquidazione, S.p.A.

Riunione Adriatica Di Sicurta, S.p.A.

United States Fidelity & Guaranty Company

Leicht Transfer and Storage Company

All parties listed above should be parties before this Court and (except for petitioner Societá Cooperativa L'Arciere) designated as respondents.

The name of one additional entity, A. Hartrodt S.R.L., appears in the caption of the court from which review is sought, but in fact this entity was dismissed by stipulation prior to appeal and is not believed to have an interest in the outcome of the petition.

CORPORATE DISCLOSURE STATEMENT

Petitioner Societá Cooperativa L'Arciere is an Italian cooperative, with no precise American juridical analogue. It has no parent corporation, and no publicly held company owns 10% or more of Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

Societá Cooperativa L'Arciere ("L'Arciere") respectfully petitions for a writ of certiorari to review a judgment and opinion of the Supreme Court of Wisconsin dated July 10, 2001.

OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin, Pet. App., *infra*, at 1-45, is reported as *Kopke v. A. Hartrodt S.R.L.*, 2001 WI 99, ___ Wis. 2d ___, 629 N.W.2d 662. It came to that court on certification from the Wisconsin Court of Appeals; for that reason, the latter court issued no substantive opinion on the question presented herein. The decision and order of the Wisconsin Circuit Court are unreported.

JURISDICTION

The Supreme Court of Wisconsin issued its opinion on July 10, 2001. No request for reconsideration was filed and no order granting any extension within which to petition for a writ of certiorari has been entered. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution, U.S. CONST. amend. XIV, § 1, provides in relevant part that "No State shall . . . deprive any

person of life, liberty, or property, without due process of law. . . . "

STATEMENT OF THE CASE

Underlying Facts

This is an action for personal injuries sustained by respondent Timothy J. Kopke. Kopke, a truck driver, was injured when a pallet loaded with paper fell out of an intermodal cargo container he was opening in Neenah, Wisconsin. (An intermodal container is one which may be transported by, and switched to and from, truck, train, or ship.)

The paper in question was manufactured in Crusinello, Italy and shipped to Wisconsin by the predecessor of respondent Cartiere Binda in Liquidazione, S.p.A. ("Binda"). Binda loaded the container using dock workers obtained by contract from petitioner Societá Cooperativa L'Arciere ("L'Arciere"), an Italian cooperative which provides leased laborers to various companies and governmental agencies in Italy.

L'Arciere's role in the loading process consisted of providing Binda with raw manpower. Binda's employees placed the paper on pallets, which they shrink-wrapped and took to Binda's loading department. There, under Binda's supervision, the leased L'Arciere workers arranged the pallets in accordance with loading diagrams furnished by Binda for each container, and braced the load with materials furnished by Binda and according to standard procedures established by Binda.

There is no evidence whatsoever that L'Arciere or any of its leased workers were aware of, or had any reason to concern themselves with, the containers' destination.

There is, however, some evidence from which, the majority of the Wisconsin Supreme Court concluded, L'Arciere had constructive knowledge of the containers' destination. The container that injured Kopke was one of at least 40 containers loaded at Crusinello which were shipped to Wisconsin for CTI Paper USA, Inc., a Binda customer, between November, 1996 and May, 1997. At the top of the loading plans for five of these 40 shipments (but not including the container which caused Kopke's injuries, whose loading plan was "lost" by Binda after the accident) appear descriptive notations which read, variously, "Contenitore X CTI," "Contenitore X Neenah," or "Cont. X CTI Appleton." None of the loading plans produced by Binda contained the words "Wisconsin" or "U.S.A."; nor is there any evidence of what destination (if any) appeared at the top of the lost loading plan for the container in question; nor is there any evidence that the designations which did appear on the five loading plans were understood by the L'Arciere workers as references to cities or customers in the United States, let alone Wisconsin.

There also is a series of product damage reports, generated by CTI and sent to Binda, relating to many of the 40 shipments. However, there is no evidence that any of these reports were ever brought to the attention of L'Arciere or were otherwise available to it.

L'Arciere does no business in the United States. It has no agents or representatives in the United States (other than the lawyers who represent it in this action). It has never engaged in or solicited any business in the United States. It derives no income from the United States. None of its workers is an American citizen, nor has any been employed by L'Arciere in the United States. L'Arciere's liability insurance coverage explicitly excludes the United States and Canada. L'Arciere provides no services to American corporations or their subsidiaries; the companies to which L'Arciere leases workers are all Italian-based (with the exception of one subsidiary of a Swedish company and one subsidiary of a French company). L'Arciere engages in limited advertising in Italy; it does not advertise in the United States. Although L'Arciere has an Internet site, it is solely in the Italian language and advertises only the availability of its workers in Italy. L'Arciere's contract with Binda specifies that the "exclusive court" for resolving disputes between them is in Varese, Italy.

How the Federal Question Was Presented

The constitutionality of asserting long-arm jurisdiction over petitioner was raised explicitly: in petitioner's answer; in its motion to dismiss for lack of jurisdiction and supporting briefs filed in the Circuit Court; in a petition to the Wisconsin Court of Appeals for leave to appeal a non-final order; in the briefs submitted to that intermediate court prior to certification; and in briefs to and oral argument before the Supreme Court of Wisconsin.

The Wisconsin Supreme Court affirmed the trial court's order denying petitioner's motion to dismiss. In an opinion joined by four of the seven justices, the court expressly adopted the "stream of commerce" test as articulated by the plurality opinion authored by Justice Brennan in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 117 (1987), and rejected the "purposefully directed" test articulated by the plurality opinion authored by Justice O'Connor in that same case. *Id.* at 112; Pet. App., *infra*, at 18-20, ¶¶ 29-30. According to the majority opinion of the Wisconsin Supreme Court, the indirect benefit L'Arciere received as a result of servicing Binda, combined with what the court viewed as L'Arciere's constructive knowledge of the containers' destination, was enough to constitute "purposeful availment" of the benefits and protections of Wisconsin law. Pet. App., *infra*, at 21-24, ¶¶ 32-38.

Three of the seven justices dissented, principally because the majority had "creat[ed] a minimum contacts test based upon foreseeability. . . . " Pet. App., *infra*, at 41, ¶ 63. "If what the majority concludes qualifies as minimum contacts is indeed sufficient," reasoned the dissent, "then there is, in effect, nothing left of the doctrine of minimum contacts. . . . " Pet. App., *infra*, at 29, ¶ 49.

REASONS FOR ALLOWING THE WRIT

For over twenty years, federal and state courts alike have struggled without success to resolve the conflicting formulations of the "stream of commerce" test for personal jurisdiction advanced in *World-Wide Volkswagen*

Corp. v. Woodson, 444 U.S. 286 (1980) and *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). The Wisconsin Supreme Court, purporting to apply the formulation suggested in the plurality opinion authored by Justice Brennan in *Asahi*, in fact extended its reach far beyond the most expansive view of "minimum contacts" ever sanctioned by this Court. Not only does its decision threaten to destroy any vestige of predictability the Due Process Clause seeks to foster but, by its aggressive expansion of the forum's extraterritorial reach over alien defendants, invites like treatment of United States citizens by foreign courts. Only this Court can resolve this conflict and do so in a way that takes full account of the sovereign interests of the several states, the nation as a whole, and the international community.

I. THE CONFLICTING FORMULATIONS OF THE "STREAM OF COMMERCE" DOCTRINE SET FORTH IN *WORLD-WIDE VOLKSWAGEN v. WOODSON* AND *ASAHI METAL INDUSTRIES v. SUPERIOR COURT* HAVE GENERATED SUBSTANTIAL CONFUSION IN BOTH STATE AND FEDERAL COURTS.

Since at least *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), it has been settled that a court may exercise personal jurisdiction over a non-resident defendant so long as there exist "minimum contacts" between the defendant and forum state. *Id.* at 316. Almost as old is the proposition that, to establish such minimum contacts, there must be "some act by which the defendant *purposefully* avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits

and protection of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (emphasis added).

Beginning with *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E.2d 761 (Ill. 1961), courts applying the standards of *International Shoe* have struggled to determine whether a non-resident defendant's placement of goods into the stream of commerce, alone or in combination with other circumstances, is enough to constitute such "minimum contacts." Although this issue first arose in product liability actions, what has become known as the "stream of commerce doctrine" has been used to extend jurisdiction over non-resident defendants in a variety of cases, including breach of contract; fraud; patent, copyright and trademark infringement; and violations of federal antitrust, tax, and environmental laws. *See* Kim Dayton, *Personal Jurisdiction and the Stream of Commerce*, 7 REV. LITIG. 239, 261 n.73 (1988) ("Dayton") (collecting cases); Erik T. Moe, Comment, *Asahi Metal Industry Co. v. Superior Court: The Stream of Commerce Doctrine, Barely Alive But Still Kicking*, 76 GEO. L.J. 203, 204 n.7 (1987) ("Moe") (same). As one commentator has observed, however, a "common formulation of the theory and its wide acceptance" during this period masked an underlying uncertainty about the theory's appropriate reach. Mollie A. Murphy, *Personal Jurisdiction and the Stream of Commerce Theory: A Reappraisal and a Revised Approach*, 77 KY. L.J. 243, 244 and nn.64-127 and accompanying text (1989) ("Murphy").

Not until 1980 did this Court place limits on the use of the doctrine. In *World-Wide Volkswagen*, this Court held that an out-of-state automobile wholesaler and retailer which carried on no activities in the forum state were not

subject to jurisdiction where the allegedly defective automobile they sold had made its way into that state through means beyond their control. In the course of so holding, this Court observed, in *dictum*, that a state would not exceed its powers under the Due Process Clause "if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 444 U.S. at 297-298, citing *Gray*. Where, however, the presence of the products in the forum state was due to the " 'unilateral activity of those who claim some relationship with a nonresident defendant,' " the Due Process Clause would not be satisfied, even though it might be foreseeable that the products would make their way there. *Id.* at 298, quoting *Hanson*, 357 U.S. at 253.

Over the next several years, courts attempted to reconcile the *dictum* in *World-Wide Volkswagen* with *International Shoe* and *Hanson*. *See generally* Dayton at 267-68; Moe at 211 n.58; R. Lawrence Dessem, *Personal Jurisdiction After Asahi: The Other (International) Shoe Drops*, 55 TENN. L. REV. 41, 51-57 (1987).

In 1987, this Court revisited the doctrine in *Asahi*. There, eight members of this Court agreed that the exercise of jurisdiction over the alien manufacturer of a defective component part which had made its way through the stream of commerce to the forum state would not comport with fair play and substantial justice, particularly where the real dispute remaining in the litigation was between two foreign nationals. 480 U.S. at 113-116. The Court was unable to agree, however, on the degree to

which a foreign manufacturer needed to intend a consequence in the forum state in order to constitute "purposeful availment."

In an opinion authored by Justice O'Connor and joined in pertinent part by the Chief Justice, Justice Powell, and Justice Scalia, one plurality declared that a defendant's mere awareness that the stream of commerce "may or will sweep the product into the forum State" was not enough; according to that plurality, long-arm jurisdiction could not be exercised over a non-resident defendant unless that defendant's contacts with the forum state were shown to have "come about by an *action of the defendant purposefully directed toward the forum State.*" *Id.* at 112 (emphasis in original).

Another plurality opinion, authored by Justice Brennan and joined by Justice White, Justice Marshall, and Justice Blackmun, disagreed, expressing the view that "[a]s long as a [defendant] is aware that the final product is being marketed in the forum State," jurisdiction premised on the placement of a product into the stream of commerce may be consistent with the due process clause, and no showing of "additional conduct" is required. *Id.* at 117.

A separate opinion, authored by Justice Stevens and joined by Justice White and Justice Blackmun, declined to endorse either view on the basis that resolution of the issue was unnecessary to the disposition of the case, and questioned whether an "unwavering line" could be "drawn between 'mere awareness' that a component will find its way into the forum State and 'purposeful availment' of the forum's market." *Id.* at 121-22.

This Court has not addressed the stream of commerce doctrine since *Asahi*, and neither federal nor state courts have been able to reach any unified or coherent formulation of the doctrine. Some circuit courts of appeal have concluded (consistent with the opinion authored by Justice O'Connor) that placement of an article in the stream of commerce is not a sufficient predicate for jurisdiction, even if the defendant was aware of its possible destination. *See, e.g., Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 85 (1st Cir. 1997); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945-946 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995). Others have adopted the opinion authored by Justice Brennan. *See, e.g., Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 614-15 (8th Cir.), *cert. denied sub nom. Hosoya Fireworks Co. v. Barone*, 513 U.S. 948 (1994). Still others apply the *dictum* of *World-Wide Volkswagen* as if it were a holding. *See, e.g., Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946-47 (7th Cir. 1992). And yet still others (apparently, the majority) have declined to adopt any specific formulation, choosing to resolve each case "on the facts." *See, e.g., Pennzoil Prods. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 205-07 (3d Cir. 1998); *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1265 (6th Cir. 1996); *Tanner v. Illinois Tool Works, Inc.*, No. 95-35030, 1996 WL 75303, at *4 n.1 (9th Cir. Feb. 21, 1996) (unreported); *Viam Corp. v. Iowa Export-Import Trading Co.*, 84 F.3d 424, 428 (Fed. Cir. 1996).

State court decisions which grapple with the stream of commerce doctrine are legion, and even more difficult to summarize; generally, they exhibit the same fault lines visible in the federal decisions. Some appear to endorse

the narrow formulation found in the concurrence authored by Justice O'Connor, *see, e.g., Anderson v. Metropolitan Life Ins. Co.*, 694 A.2d 701, 703 (R.I. 1997) (per curiam); others, the broader formulation set out in the opinion authored by Justice Brennan. *See, e.g., Hill v. Showa Denko, K.K.*, 425 S.E.2d 609, 616 (W. Va. 1992), *cert. denied*, 508 U.S. 908 (1993); *Grange Ins. Ass'n v. Washington*, 757 P.2d 933, 938 (Wash. 1988) (*en banc*) (*dictum*), *cert. denied*, 490 U.S. 1085 (1989); *Kopke*, Pet. App., *infra*, at 18-20, ¶¶ 29-30. Most have avoided choosing, *see, e.g., Ruckstuhl v. Owens Corning Fiberglas Corp.*, 731 So. 2d 881, 886-89 (La.), *cert. denied sub nom. Hollingsworth v. Vose*, 528 U.S. 1019 (1999), including the state which first adopted the original, and broadest, formulation of the stream of commerce doctrine. *See Wiles v. Morita Iron Works Co.*, 530 N.E.2d 1382, 1384-90 (Ill. 1988). Several states have adopted long-arm statutes which include versions of the "stream of commerce" theory. *See* LA. REV. STAT. § 13:3201(A)(8) (2000); CONN. GEN. STAT. § 52-59b(a)(3)(B) (2001); S.C. CODE ANN. § 36-2-803(1)(h) (2000).

Commentary on *World-Wide Volkswagen* and *Asahi* has concluded that they provide little practical or theoretical guidance. *See, e.g.*, Dayton, *supra*, at 241-42 (. . . "the three opinions rendered in *Asahi* . . . renew old [questions] about the conceptual foundations underlying the law of personal jurisdiction"); Moe, *supra*, at 228 (" . . . it is essential that due process principles be articulated with sufficient clarity for consistent application in the lower courts"); Pamela J. Stephens, *Sovereignty and Personal Jurisdiction Doctrine: Up the Stream of Commerce Without a Paddle*, 19 FLA. ST. U. L. REV. 105, 106, 125 (1991) ("the current formulation of doctrine is neither adequate to

explain [recent Supreme Court] decisions nor to predict future results . . . [L]ower federal and state courts are likely to continue as before, awaiting a definitive Supreme Court decision in this area"); Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping and Outcome Determination Under International Shoe*, 28 U.C. DAVIS L. REV. 769, 836 (1995) ("Cameron and Johnson") (" . . . the problem is not one of simple uncertainty on the fringes, which is commonplace in many areas of the law. Rather, the core of jurisdiction doctrine is unsettled").

Various conceptual solutions have been proposed, in turn, with no consensus. *See, e.g.*, Kevin C. McMunigal, *Desert, Utility, and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L.J. 189 (1998) (proposing same); Andrew L. Strauss, *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 HARV. INT'L L.J. 373 (1995) (call for international standards); Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 78-79 (1991) (proposing legislative solution); Lea Brilmayer, *Liberalism, Community and State Borders*, 41 DUKE L.J. 1 (1991) (analyzing jurisdiction under liberal and communitarian approaches); Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 11 (1987) (asserting need for single constitutional standard for jurisdiction in international cases); *cf.* Earl M. Maltz, Comment, *Unraveling the Conundrum of the Law of Personal Jurisdiction: A Comment on Asahi Metal Industry Co. v. Superior Court of California*, 1987 DUKE L.J. 669 (attempting to reconcile *Asahi* with various conceptions of fairness).

This chaotic patchwork of approaches to personal jurisdiction, we respectfully submit, falls far short of the "orderly administration of the laws" which the Due Process Clause is to ensure. *World-Wide Volkswagen*, 444 U.S. at 297. Unless and until the appropriate scope of the stream of commerce doctrine is resolved, no foreign manufacturer, processor, or handler of goods (or corporate affiliate of same) can hope to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Ibid.* In light of recent evidence confirming a strong correlation between forum selection and case outcome, *see* Cameron & Johnson, *supra*, 28 U.C. DAVIS L. REV. at 817-828, the result will be a diminution in the predictability of the outcome of disputes, an increase in the risk that jurisdictional principles will be manipulated solely for purposes of affecting that outcome, and yet a further increase in needless litigation over threshold issues of the forum's competence.

II. THE EXERCISE OF JURISDICTION BASED ON THE MERE FORESEEABILITY THAT PRODUCTS HANDLED BY DEFENDANTS WOULD MAKE THEIR WAY INTO THE FORUM STATE GOES WELL BEYOND THE FURTHEST REACHES OF DUE PROCESS EVER SANCTIONED BY THIS COURT.

There is no evidence whatsoever that L'Arciere, through its leased workers or otherwise, was aware that any of Binda's products were destined for Wisconsin. The Wisconsin Supreme Court, however, believed that this was immaterial. Adopting the reasoning of the Eighth

Circuit Court of Appeals in *Barone*, 25 F.3d at 613-15, it concluded that, for jurisdictional purposes, there is no difference between actual and constructive knowledge. Pet. App., *infra*, at 23-24, ¶ 38.

In so holding, the Wisconsin Supreme Court stretched the "stream of commerce" doctrine well beyond the outermost limit ever sanctioned by this Court. Whatever their other differences, both "stream of commerce" formulations advanced in *Asahi* agreed on one thing: in order to be subject to jurisdiction, the defendant must at least have been aware that the products it placed into the stream of commerce were making their way into the forum state. *See* 480 U.S. at 112, 117. Likewise, the stream of commerce test described in *World-Wide Volkswagen* requires that a non-resident defendant deliver the goods into the stream of commerce "with the *expectation* that they will be purchased by consumers in the forum State." 444 U.S. at 298 (emphasis added). *Cf. Calder v. Jones*, 465 U.S. 783, 789-90 (1984) (jurisdiction in libel action could be asserted over author and editor of libelous publication where their actions were "expressly aimed" at the forum state and they had actual knowledge that the brunt of plaintiff's injuries would be felt there). Indeed, absent such awareness it is difficult to characterize a party as "purposefully avail[ing] itself of the privilege of conducting activities within the forum State," *Hanson*, 357 U.S. at 253, much less "purposefully direct[ing]" its actions toward that state. *Asahi*, 480 U.S. at 112 (O'Connor, J.).

As the dissenting opinion below recognizes, what the majority has done is create a "minimum contacts" test based upon foreseeability. Pet. App., *infra*, at 41, ¶ 63. Yet,

as this Court observed in *World-Wide Volkswagen*, " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." 444 U.S. at 295. "If foreseeability were the criterion," observed this Court, "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel." *Id.* at 296. This, of course, is not the law; a defendant must be able to foresee not only that its product will find its way into the forum state, but that its "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297. Nothing about L'Arciere's role in these events could reasonably have caused it to expect it would be subject to suit in any state or nation where Binda's customers might be found.

Nor does the fact that L'Arciere might be said to have benefited in some indirect way from Binda's sales to Wisconsin substitute for purposeful availment, as the Wisconsin Supreme Court thought. Pet. App., *infra*, at 22, ¶ 36. As this Court has noted, "financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State." *World-Wide Volkswagen*, 444 U.S. at 299.

The "minimum contacts" doctrine performs two essential functions: it protects a defendant "against the burdens of litigating in a distant or inconvenient forum"; and it "ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 291-92. The Wisconsin Supreme Court's use of abstract

foreseeability as a substitute for purposeful availment undermines both these functions. The increasing globalization of commerce has made it "foreseeable" – at least, in the sense used by the Wisconsin Supreme Court – that goods placed in the stream of commerce may end up virtually anywhere. If "minimum contacts" can be satisfied by abstract foreseeability, almost anyone in or near the chain of distribution will be subject to jurisdiction wherever the product travels, no matter how distant or inconvenient the forum and no matter how localized the actor's conduct. Moreover, use of abstract foreseeability as a substitute for purposeful availment constitutes an open invitation for states and nations alike to reach out far beyond the limits traditionally imposed on them by their status as coequal sovereigns in our federal and international systems. And if this is allowed, there will be, as the dissenting opinion in the court below warned, "nothing left of the doctrine of minimum contacts." Pet. App., *infra*, at 29, ¶ 49.

III. CLARIFICATION OF THE APPROPRIATE REACH OF THE STREAM OF COMMERCE DOCTRINE IS OF THE UTMOST IMPORTANCE TO ASSURING STABLE INTERNATIONAL RELATIONS.

" 'Great care and reserve should be exercised,' " this Court has observed, " 'when extending our notions of personal jurisdiction into the international field.' " *Asahi*, 480 U.S. at 115, quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting).

This admonition is well-founded. The substantial burden placed on a foreign defendant summoned to

defend itself thousands of miles away in an unfamiliar judicial system in a foreign language is obvious. But just as important is the potential effect on international relations. Principles of international comity require that our courts apply the same standards, and exercise the same restraint, that we expect of other nations. *See generally M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 n.11 (1974); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817-18 (1993) (Scalia, J., dissenting). If we allow American courts to extend their jurisdiction over foreign defendants who could not reasonably expect that they would be subject to suit in the United States, by what principle will we prevent foreign courts from doing the same to our citizens? At the very least, overly aggressive assertion of jurisdiction over the citizens of other countries may cause other nations to decline to recognize judgments of American courts. *See* Note, *Jurisdiction Over Alien Corporations Based on the Activities of Their Subsidiaries in the Forum: Whither the Doctrine of Corporate Separateness?* 9 FORDHAM INT'L L.J. 540, 589 (1986); Russell J. Weintraub, *Jurisdiction Over the Foreign Non-Sovereign Defendant*, 19 SAN DIEGO L. REV. 431, 436 (1982). At worst, it can "produce political, legal, and economic reprisals." Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127 (1966). *See also* Raymond Paretsky, *A New Approach to Jurisdictional Questions in Transnational Litigation in U.S. Courts*, 10 U. PA. J. INT'L BUS. L. 663, § 2 (1989).

The outermost limits of the reach of our courts cannot be drawn with absolute precision. But it should be possible to formulate coherent principles which take into

account not only the interests of individual litigants and the forum state, but national and international concerns as well. Based on the experience of the last two decades, it is clear that only this Court is in a position to do so.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 27th day of September, 2001.

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Supreme Court of Wisconsin.

Timothy J. KOPKE, Plaintiff-Respondent, United States Fidelity & Guaranty Company, a foreign insurance corporation and Leicht Transfer and Storage Co., a Wisconsin corporation, Subrogated-Plaintiffs-Respondents,

v.

A. HARTRODT S.R.L., a foreign corporation, Defendant, Cartiere Binda in Liquidazione S.p.A., a foreign corporation, Defendant-Third-Party Plaintiff-Respondent, Societa' Cooperativa L'Arciere, a foreign corporation, Defendant-Appellant,

v.

Riunione Adriatica Di Sicurta S.p.A., a foreign corporation, Third-Party Defendant-Respondent.

No. 99-3144.

Argued April 30, 2001.
Decided July 10, 2001.

For the defendant-appellant there were briefs by *W.H. Levit Jr.*, *Winston A. Ostrow*, *Michael B. Apfeld* and *Godfrey Kahn, S.C.*, Milwaukee, and oral argument by *Michael B. Apfeld*.

For the plaintiff-respondent there was a brief (in the court of appeals) by *Lee J. Geronime*, *David A. Krutz*, *Leslie C. Mastey* and *Michael Best & Friedrich LLP*, Milwaukee, and oral argument by *Chris J. Trebatoski*.

For the defendant-third-party plaintiff-respondent there was a brief (in the court of appeals) by *Trevor J. Will*,

Eric J. Massen and *Foley & Lardner*, Milwaukee, and oral argument by *R. George Burnett*.

For the third party-defendant-respondent there was a brief by *Frank J. Daily, Daniel J. La Fave* and *Quarles & Brady LLP*, Milwaukee, and oral argument by *Daniel J. LaFave*.

Appeal from an order of the Circuit Court for Brown County, William M. Atkinson, Circuit Court Judge.

Affirmed.

¶1 *WILLIAM A. BABLITCH*, J. Societa' Cooperativa L'Arciere (L'Arciere), an Italian cooperative, challenges the exercise of *in personam* jurisdiction over it. This challenge presents two inquiries: (1) Whether the facts presented satisfy Wisconsin's long-arm statute, Wis. Stat. § 801.05(4) (1997-98)[1]; and (2) Whether L'Arciere has "minimum contacts" with this State such that the court's exercise of jurisdiction would be fair and in accordance with the Fourteenth Amendment's due process requirements. We conclude that the requisite tests to establish personal jurisdiction over L'Arciere are satisfied. Accordingly, we affirm the ruling of the circuit court.

FACTS

¶2 In May of 1997 Timothy J. Kopke (Kopke), a truck driver, was seriously injured when he opened a cargo container in Neenah, Wisconsin. The injury occurred when a pallet loaded with paper fell out of the cargo

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[1] All subsequent statutory references are to the 1997-98 volume, unless otherwise indicated.

container and onto Kopke. The paper had been shipped to Neenah from Crusinello, Italy, by its manufacturer, Cartiere Binda in Liquidazione, S.p.A. (Binda). The paper had been purchased from the Binda's Crusinello mill by CTI Paper USA, Inc. (CTI). CTI had been purchasing paper product from the Crusinello mill since 1991.

¶3 CTI is not a party to this action, although it supplied damage reports on cargo containers received from Binda. Forty-four damage reports were issued between August 1996 and September 1997.

¶4 In 1995 Binda entered into a contract with L'Arciere, an employee-owned Italian cooperative, to provide workers to load product into cargo containers. L'Arciere workers and Binda employees each played a role in the loading of product into cargo containers.

¶5 Binda employees would place the paper to be shipped on pallets and cover it with shrink-wrap. Binda's setup department prepared loading plans for the containers. Binda produced loading plans for five of the shipments occurring between November 1996 and May 1997. At the top of these plans is written either "Cont. X CTI Appleton," "Contenitore X CTI" or "Contenitore X Neenah." Kopke explains that "Contenitore," or "cont." as it is abbreviated, is an Italian word meaning "container" and "X" is an abbreviation for "per," meaning "to." "Contenitore X CTI Appleton" identifies a container as being loaded for shipment to CTI in Appleton.

¶6 In conformity with the loading plan, L'Arciere workers moved the pallets into the cargo container. The L'Arciere workers placed the pallets into the cargo container and secured it using boards, bracing beams, and

inflated air bags to fill side spaces. Binda supplied these packing materials.

¶7 After Kopke sustained his injury he brought a claim for damages against Binda, L'Arciere, and others. L'Arciere moved to dismiss for lack of personal jurisdiction. Brown County Circuit Court Judge William M. Atkinson denied this motion. Judge Atkinson ruled that L'Arciere's acts of stabilizing the products being shipped by surrounding the product with air bags, and installing bracing beams and boards into the cargo container, were acts that were part of a processing of a product. The circuit court judge was also satisfied that the minimum contacts requirement for due process purposes was met.[2] L'Arciere appealed. The court of appeals accepted L'Arciere's appeal, and subsequently the court certified the appeal to this court pursuant to Wis. Stat. (Rule) § 809.61.

ANALYSIS

¶8 One issue is presented: Did the circuit court err by denying a motion to dismiss for lack of personal jurisdiction over L'Arciere? Every personal jurisdiction issue requires a two-step inquiry. *In re Liquidation of All-Star Ins. Corp.*, 110 Wis. 2d 72, 76, 327 N.W.2d 648 (1983) (discussing personal jurisdiction pursuant to Wis. Stat. § 645.04(5)(a)); *Lincoln v. Seawright*, 104 Wis. 2d 4, 10-11, 310 N.W.2d 596 (1981). It must first be determined

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[2] Judge Atkinson also denied L'Arciere's motion for summary judgment. This decision on summary judgment is not presented for review here.

whether defendants are subject to jurisdiction under Wisconsin's long-arm statute. *See Lincoln,* 104 Wis. 2d at 10, 310 N.W.2d 596. If the statutory requirements are satisfied, then the court must consider whether the exercise of jurisdiction comports with due process requirements. *Id.* "[P]laintiff has the minimal burden of establishing a prima facie threshold showing that constitutional and statutory requirements for the assumption of personal jurisdiction are satisfied." *Ammon v. Kaplow,* 468 F.Supp. 1304, 1309 (D.Kan.1979). In this review, we may consider documentary evidence and weigh affidavits in reaching a determination as to whether this burden has been met. *Id.* "Factual doubts are to be resolved in favor of the plaintiff." *Id.* We begin our analysis with consideration of Wisconsin's long-arm statute.

¶9 Wisconsin Stat. § 801.05(4) authorizes the exercise of personal jurisdiction over nonresidents whose act or omission committed outside of Wisconsin gives rise to an injury within the state. All the participants to this appeal agree that if the courts have personal jurisdiction over L'Arciere, it arises under § 801.05(4)(b), set forth below:

> A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:
>
> . . .
>
> (4) Local injury; foreign act. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:
>
> . . .

> (b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

¶10 Application of Wis. Stat. § 801.05(4)(b) to the facts of this case presents a question of law, which we review independently. *Marsh v. Farm Bureau Mut. Ins. Co.*, 179 Wis. 2d 42, 52, 505 N.W.2d 162 (Ct.App.1993). Wisconsin's long-arm statute is liberally construed in favor of jurisdiction. *Id.* (citing *Lincoln*, 104 Wis. 2d at 9, 310 N.W.2d 596). The plaintiff must carry the burden of establishing jurisdiction. *Lincoln*, 104 Wis. 2d at 9, 310 N.W.2d 596.

¶11 The dispute here is focused upon whether L'Arciere engaged in conduct described in Wis. Stat. § 801.05(4)(b). Kopke asserts that L'Arciere engaged in "processing." In support of his position, Kopke relies upon *Nelson by Carson v. Park Industries, Inc.*, 717 F.2d 1120 (7th Cir. 1983). In *Nelson*, the Seventh Circuit Court of Appeals examined § 801.05(4)(b) (1981-82) and concluded that "the word 'processed' should be interpreted to include a distributor's purchase and sale of goods in the normal course of the distribution of those goods." *Id.* at 1124. The court then further defined "to process" as follows:

> The verb "to process" certainly may refer to the narrower concept of preparing something in the sense of manufacturing it. However, it also has the broader definitions of subjecting something to a particular system of handling to effect a particular result and preparing something for market or other commercial use by subjecting it

> to a process. *See* Webster's Third New International Dictionary of the English Language (1963). We think these broader definitions include the actions of a distributor such as [the defendant], i.e., purchasing and selling goods in the ordinary course of trade in a distribution system.

Id. at 1124 n.5.

¶12 Kopke asserts that the activities performed by L'Arciere at the Binda mill with respect to the paper product falls directly within the definition of "process" set forth in *Nelson*. L'Arciere had an exclusive contract with Binda to load product at the mill. Kopke points out that damage reports produced by CTI show that L'Arciere loaded at least 45 cargo containers for shipment to Wisconsin; 39 of which arrived between November 1996 and May 1997.[3] He argues that L'Arciere processed the product for shipment to Wisconsin when it loaded and secured the product in the cargo container. This loading was, in Kopke's view, a necessary function in preparing the product for market, for the product would not have arrived in Neenah, Wisconsin, without the loading performed by L'Arciere.

¶13 In rebuttal, L'Arciere asserts that the ordinary understanding of the word "process" as it is used in Wis. Stat. § 801.05(4)(b) means an action directed toward the transformation of the object being processed. It contends

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[3] These numbers represent only the number of containers shipped to Wisconsin in which cargo had been damaged. A receiving damage report was faxed to Binda for each cargo container that had damaged goods. Containers that did not have damaged cargo were not reported in CTI's documents.

that this meaning is supported by dictionary definitions, the placement of the word "process" between "manufactured" and "serviced" in the statute, and by examining how the legislature used the word "process" elsewhere in the Wisconsin statutes.

¶14 A narrow interpretation of the word "process" is also urged by third-party defendant-respondent Riunione Adriatica di Sicurta' S.p.A. (RAS). RAS, an Italian insurance company, issued a policy to Binda. RAS asserts, however, that even under L'Arciere's more narrow interpretation its activities constitute processing of materials under Wis. Stat. § 801.05(4)(b).

¶15 The question presented is, therefore, whether the word "process" means to bring about a physical transformation upon the products, materials, or things themselves, as urged by L'Arciere and RAS, or whether process is a broader term as suggested by the Seventh Circuit in *Nelson*, and by Kopke and Binda. We agree with Kopke and Binda.

¶16 "The fundamental rule of construction of a statute is to ascertain and give effect to the intention of the legislature as expressed in the statute." *Zarnott v. Timken-Detroit Axle Co.*, 244 Wis. 596, 599-600, 13 N.W.2d 53 (1944). Wisconsin Stat. § 801.05 does not define the word "process." The legislature has set forth as a general rule that "words and phrases shall be construed according to common and approved usage. . . . " Wis. Stat. § 990.01(1). "The common and approved usage of words can be established by the definition of a recognized dictionary." *Milwaukee County v. Dep't of Indus., Labor and Human Relations Comm'n*, 80 Wis. 2d 445, 450, 259 N.W.2d 118 (1977). L'Arciere cites the definition of "process" from *Random*

House Webster's Unabridged Dictionary 1542 (2d ed. 1998), defining process as " '-v.t. **10.** to treat or prepare by some particular process, as in manufacturing.' " The analysis adopted in *Nelson*, urged by Kopke, relied upon *Webster's Third New International Dictionary of the English Language* (1963) for its determination that "to process" may refer to "the broader definitions of subjecting something to a particular system of handling to effect a particular result and preparing something for market or other commercial use by subjecting it to a process." *Nelson*, 717 F.2d at 1124 n.5. The dictionary, therefore, does not resolve the question of whether a broad or narrow meaning should be applied to the word "process."

¶17 When reasonable minds could differ as to the meaning of a statute, the court examines the scope, history, context, subject matter and purpose of the statute in question. *Brauneis v. LIRC*, 2000 WI 69, ¶21, 236 Wis. 2d 27, 612 N.W.2d 635. Wisconsin's long-arm statute was designed to satisfy the requirements of due process. *Schmitz v. Hunter Mach. Co.*, 89 Wis. 2d 388, 403, 279 N.W.2d 172 (1979). The 1959 revision notes state that the statute incorporates grounds that expand the exercise of personal jurisdiction in cases having substantial contacts with this state. Revision Notes – 1959 by G.W. Foster, Jr. for St. 1959, § 262.05, Wis. Stat. Ann. § 801.05 (West 1977).[4] Because the objective of the statute was to expand personal jurisdiction we conclude that the broad definition of "process" suggested by *Nelson*, 717 F.2d at 1124

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[4] The Wisconsin Rules of Civil Procedure were renumbered by Supreme Court Order, 67 Wis. 2d 595, 592-96 (1975) (eff. January 1, 1976).

n.5, properly reflects the legislative intent in adopting this statute. Further, this definition is in keeping with this court's consistent statement that "statutes regulating long-arm jurisdiction are . . . to be given a liberal construction in favor of the exercise of jurisdiction." *Schroeder v. Raich*, 89 Wis. 2d 588, 593, 278 N.W.2d 871 (1979). Accordingly, we adopt that broad definition here. As a result, we agree with Kopke that L'Arciere engaged in processing pursuant to Wis. Stat. § 801.05(4) and affirm this conclusion by the circuit court.

¶18 L'Arciere presents several additional arguments against this conclusion, which we find unpersuasive. L'Arciere points out that the word "processed" appears in numerous other statutes, ranging from processing dead animals Wis. Stat. § 95.72(1)(c)3 to processing controlled substances Wis. Stat. § 961.571(1)(a). L'Arciere does not argue that these statutes are in any way cross-referenced or linked together with Wis. Stat. § 801.05, other than that in its view these statutes use "process" as a concept distinct from packing, packaging, or related concepts. There are limits as to how much and what kind of statutory context is relevant to the analysis of a particular word in an individual statutory section. "The risk of misunderstanding as a result of allowing irrelevant portions of a text to influence the meaning attributed to the segment of text being construed is probably just as risky as taking any statement out of context." 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:02, at 211 (6th ed. 2000). We conclude that this attempt to determine the meaning of "process" in subsection (4)(b) by examining the word as it appears in other sections throughout

the statutory code distorts, rather than clarifies, legislative intent in creating § 801.05. Without something more, such as one statute being incorporated into another, or two statutes addressing closely related subjects that consideration of one would logically bring the other to mind, "[e]very statute is an independent communication, for which either the intended or the understood meaning may be different." 2A *id.* § 45.14, at 110. Accordingly, we do not concur with this statutory analysis argument.

¶19 Further, although L'Arciere correctly points out that "process" appears between "manufactured" and "serviced" it does not necessarily follow that "process" is to be interpreted as meaning "a transformation as occurs in manufacturing." " 'It is an elementary rule for the construction of statutes that effect must be given, if possible, to every word, clause, and sentence thereof.' " *Greenebaum v. Dep't of Taxation*, 1 Wis. 2d 234, 238, 83 N.W.2d 682 (1957) (quoting *State v. Columbian Nat. Life Ins. Co.*, 141 Wis. 557, 566, 124 N.W. 502 (1910)). Were we to conclude that "process" is merely a restatement of "manufacturing," we would render "process" a redundancy. However, by adopting the broader meaning of the word, it is properly given effect in the statute.

¶20 Finally, L'Arciere cites to a decision by the Fifth Circuit interpreting Florida's long-arm statute which apparently contains language similar to Wis. Stat. § 801.05(4). In *Mallard v. Aluminum Co. of Canada*, 634 F.2d 236 (5th Cir. 1981), a longshoreman was severely injured in Florida while unloading cargo from a vessel. The vessel was owned by a Finnish corporation and time-chartered to Bathurst, Ltd., a Canadian corporation. Bathurst hired the Aluminum Company of Canada, Ltd. (ALCAN)

as stevedore for the loading operations in Canada. The injured longshoreman brought a claim of negligence against ALCAN and other defendants. ALCAN brought a motion to dismiss for lack of personal jurisdiction, which the district court granted. The Fifth Circuit affirmed, concluding that the Florida long-arm statute could not reach ALCAN. The court wrote that the relevant Florida statute "exerts jurisdiction over any nonresident who causes injury to persons or property in Florida by act or omission in another state, if products that the nonresident processed, serviced or manufactured cause injury during use or consumption in Florida." *Id.* at 241.

¶21 Despite the apparently similar language in the Florida statute and Wis. Stat. § 801.05(4), the jurisdictions differ on two critical rules of statutory interpretation that formed the basis of the decision in *Mallard*. First, Florida's long-arm statute is strictly construed. *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 627 (11th Cir. 1996). In contrast, Wisconsin's long-arm statute is liberally construed in favor of the exercise of jurisdiction. Second, Florida courts have held that "the statute requires more activities or contacts to sustain personal jurisdiction than demanded by the Constitution." *Mallard*, 634 F.2d at 241. In contrast, this court has stated that § 801.05 was designed to satisfy the requirements of due process. Therefore, we do not find the analysis in *Mallard* persuasive for the purposes of interpreting Wisconsin's long-arm statute. We conclude, therefore, L'Arciere falls within the grasp of Wis. Stat. § 801.05(4).[5]

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[5] Kopke and Binda also argue that L'Arciere "serviced" the paper within the meaning of Wis. Stat. § 801.05(4)(b). Having

¶22 Having concluded that L'Arciere falls within reach of Wis. Stat. § 801.05(4), we turn now to consider the constitutional inquiry. The Due Process Clause of the Fourteenth Amendment limits the exercise of jurisdiction by a state over a nonconsenting nonresident. Section 801.05(4) has been interpreted as a codification of federal due process requirements.[6] Compliance with the statute presumes that due process is met, subject to the objecting defendant's opportunity to rebut. *Lincoln*, 104 Wis. 2d at 10, 310 N.W.2d 596. Thus, when jurisdiction is found pursuant to the statutory analysis, the defendant may dispute the presumption of compliance with due process requirements articulated by the Supreme Court. *See Hasley v. Black, Sivalls & Bryson, Inc.*, 70 Wis. 2d 562, 577, 235 N.W.2d 446 (1975) ("The burden is not on the defendant to prove lack of contact with this state . . . even though the motion to dismiss is produced by the defense; the defendant may dispute the contacts alleged or attack the demonstrated statutory compliance on due process grounds.").[7] The limits of due process are, of course, established by the rules set forth in the decisions of the United States Supreme Court. *Zerbel v. H.L. Federman & Co.*, 48 Wis. 2d 54, 60, 179 N.W.2d 872 (1970).

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resolved this issue on the basis of the statute's use of the word "processed," we need not address this argument.

[6] *Lincoln v. Seawright*, 104 Wis. 2d 4, 10, 310 N.W.2d 596 (1981).

[7] We disagree with the statement in *Marsh v. Farm Bureau Mutual Insurance Co.*, 179 Wis. 2d 42, 53, 505 N.W.2d 162 (Ct. App. 1993) that the burden switches to the defendant to show that jurisdiction fails to comport with due process requirements of the Fourteenth Amendment.

¶23 Due process analysis presents two inquiries. The first inquiry is whether the defendant "purposefully established minimum contacts in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). On this question, the plaintiff carries the burden. *Id.* If this inquiry is answered affirmatively, then the defendant's forum-state contacts "may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " *Id.* at 476, 105 S. Ct. 2174 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). The defendant carries the burden on this question.[8] *Burger King*, 471 U.S. at 477, 105 S. Ct. 2174 ("[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.").[9]

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[8] Although in the United States Supreme Court's most recent decision involving personal jurisdiction a majority of the Justices agreed upon only the "fair play and substantial justice" standard, the opinion did employ the two-part inquiry articulated in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). *See Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

[9] In *Zerbel v. H.L. Federman & Co.*, 48 Wis. 2d 54, 64-65, 179 N.W.2d 872 (1970), this court adopted a five-factor test for due process. These factors are: "the quantity of contacts with the state, the nature and quality of the contacts, the source of the cause of action, the interest of Wisconsin in the action, and convenience." *Lincoln*, 104 Wis. 2d at 11, 310 N.W.2d 596. We conclude that these factors are encompassed within the framework set forth by the United States Supreme Court in

¶24 We turn then to apply the first inquiry of our due process analysis to the facts of this case. Under the Due Process Clause, personal jurisdiction over a nonresident defendant is proper when the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co.*, 326 U.S. at 316, 66 S. Ct. 154 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)). Minimum contacts requires that " 'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' " *Burger King*, 471 U.S. at 474, 105 S. Ct. 2174 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)). Essential to each case is " 'that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' " *Id.* at 475, 105 S. Ct. 2174 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). The "purposeful availment" requirement has become the "baseline," the primary focus, of the minimum contacts analysis. *Clune v. Alimak AB*, 233 F.3d 538, 542 (8th Cir. 2000). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.' "

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personal jurisdiction cases decided subsequent to our decision in *Zerbel*. Accordingly, we set aside the *Zerbel* factors and apply Supreme Court precedent here.

Burger King, 471 U.S. at 475, 105 S. Ct. 2174 (citations omitted). A defendant's contact with the forum state must be such that it "should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 287, 100 S. Ct. 559.

¶25 As an additional component of analysis, the litigants in this case assert that the stream of commerce theory of personal jurisdiction articulated in *World-Wide Volkswagen* and in subsequent Supreme Court cases applies here. In *World-Wide Volkswagen* and *Burger King* the Court explained:

> "[I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Cf. Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961).

World-Wide Volkswagen, 444 U.S. at 297-98, 100 S. Ct. 559; *see also Burger King*, 471 U.S. at 473, 105 S. Ct. 2174. Kopke asserts that personal jurisdiction is established under the stream of commerce theory because (1) L'Arciere routinely loaded cargo containers for shipment to Wisconsin;

(2) this destination was indicated on the plans used by L'Arciere in loading pallets of paper into the containers; and, (3) that these facts establish conduct and connection with this forum such that L'Arciere could reasonably anticipate being brought into court here when Kopke unloaded the container in Wisconsin and a pallet fell out and caused injury.

¶26 The relevance of the stream of commerce test in personal jurisdiction analysis is related to the issue of forseeability. In *World-Wide Volkswagen* the Supreme Court found the concept of forseeability insufficient to serve as a basis for personal jurisdiction under the Due Process Clause. *Asahi Metal Indus. v. Superior Court of Cal.*, 480 U.S. 102, 109, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). Yet, as noted by Justice O'Connor in *Asahi*, in *World-Wide Volkswagen* "[t]he Court disclaimed . . . the idea that 'forseeability is wholly irrelevant' to personal jurisdiction . . . ," and determined that the exercise of personal jurisdiction does not offend the Due Process Clause when a product is introduced into the stream of commerce with the expectation that it will be purchased in the forum State. *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98, 100 S. Ct. 559).

¶27 In *Asahi*, the Supreme Court divided over the correct application of the stream of commerce theory. *Asahi* concerned an indemnity action by a Taiwanese manufacturer, Cheng Shin, against Asahi, a Japanese business. Cheng Shin manufactured tire tube and Asahi manufactured the tube's valve assembly. These products were incorporated into motorcycle tires. While the motorcycle was operated in California, the tire exploded, severely injuring the driver and killing the passenger. A

product liability suit was filed in that state, and Cheng Shin was named as a defendant. The underlying tort action was settled and dismissed. Asahi sought to quash the indemnity action, arguing that exercise of personal jurisdiction violated due process.

¶28 The California Supreme Court held that personal jurisdiction did not offend due process because of Asahi's placement of its product in the stream of commerce by delivering them to Cheng Shin in Taiwan, combined with Asahi's awareness that some of Cheng Shin's tires would reach California. The United States Supreme Court reversed.

¶29 In analyzing *Asahi*, four members of the Court, Justice O'Connor, joined by Chief Justice Rehnquist, Justice Powell and Justice Scalia, concluded that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." Under this view, the " 'stream-of-commerce-plus' theory,"[10] there must be "additional conduct" by the defendant to meet the burden of establishing personal jurisdiction. *Asahi*, 480 U.S. at 112, 107 S. Ct. 1026. However, Justice Brennan, joined by Justices White, Marshall, and Blackmun, stated that this showing of "additional conduct" was not needed.[11] According to Justice Brennan:

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[10] *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993).

[11] Justice Stevens concluded that an examination of minimum contacts was unnecessary. In his view exercise of jurisdiction over *Asahi* would be "unreasonable and unfair" even if the defendant had engaged in purposeful activities in the forum State. *Asahi*, 480 U.S. at 121, 107 S. Ct. 1026.

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State. Accordingly, most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct.

Id. at 117, 107 S. Ct. 1026 (Brennan, J. concurring). Ultimately, a majority in *Asahi* concluded that the exercise of personal jurisdiction would not be reasonable or fair and accordingly violated due process. In total, "*Asahi* stands for no more than that it is unreasonable to adjudicate third-party litigation between two foreign companies in this country absent consent by the nonresident defendant." *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 614 (8th Cir. 1994).

¶30 We believe the stream of commerce theory as set forth by Justice Brennan is the correct analysis to apply to the case at hand. First, as the Seventh Circuit has noted, a

majority of the Court has not rejected the stream of commerce analysis of *Burger King* and *World-Wide Volkswagen*, and it is thus binding upon the lower courts. *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); *see also Ham v. La Cienega Music Co.*, 4 F.3d 413, 416 n.11 (5th Cir. 1993) ("Absent rejection by a majority on the Supreme Court, we have continued to apply the stream of commerce analysis found in our pre-*Asahi* cases.").

¶31 Second, although Kopke is not asserting a strict product liability claim, but is instead alleging negligence, we nevertheless conclude that the stream of commerce analysis should be applied here.[12] Kopke's injuries arose out of commercial activities and the distribution of goods in the stream of commerce. Specifically, Kopke was injured in Neenah, Wisconsin, when he opened an ocean-going cargo container and a pallet loaded with paper fell out; Kopke asserts that L'Arciere workers in Italy negligently loaded the pallet into the container that was shipped to this forum. Further, the facts of this case present a "regular course of dealing that results in deliveries" of multiple units of the product into this forum over a period of years. *See Asahi*, 480 U.S. at 122, 107 S. Ct. 1026 (Stevens, J. concurring in part and concurring in the judgment).

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[12] A discussion of the distinction between a claim grounded upon strict product liability and a claim grounded upon negligence is set forth in *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, 244 Wis. 2d 758, 628 N.W.2d 833.

¶32 Applying that test to the present case, we conclude based upon the nature of the contractual relationship between L'Arciere and Binda, the identification in the loading plans of the cargo's destination as "Appleton" and "CTI Neenah," as well as the damage reports from CTI which illustrate a not insignificant volume of business between CTI and Binda, the exercise of personal jurisdiction complies with the limits of due process because the cargo was introduced into the stream of commerce with the expectation that it would arrive in this forum.

¶33 First, we note L'Arciere had a contract with Binda to supply workers for the purpose of loading cargo containers. L'Arciere employees worked together in Italy with Binda employees to load the cargo containers. This is not a case like *Asahi* where a manufacturer operating in one international forum shipped parts to a second manufacturer in a different international forum, who incorporated these parts into a product that is shipped to yet a third international forum. In the present case, Kopke asserts that L'Arciere was negligent in the manner in which it loaded the cargo container in Italy, and that this negligence caused or contributed to causing his injuries when the cargo container was opened here in Wisconsin.

¶34 Second, the loading instructions prepared by Binda and used by L'Arciere identified the container's destination as "Neenah" or "CTI Appleton." In other words, these products did not randomly or fortuitously appear in Wisconsin; they were specifically intended to arrive in this forum. The injury that Kopke suffered occurred in the forum to which the cargo containers were directed to arrive.

¶35 Third, the damage reports prepared by CTI on cargo containers received from Binda between November 8, 1996, and May 20, 1997, demonstrate that at least 40 containers were loaded by L'Arciere workers for delivery in this forum.

¶36 We also note that L'Arciere, by virtue of its business relationship with Binda, benefited from the distribution of Binda products to this forum. "A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Asahi*, 480 U.S. at 117, 107 S. Ct. 1026 (Brennan, J. concurring). We recognize that this economic benefit arose because L'Arciere contracted with Binda to perform a service, the loading of cargo containers. In providing this service L'Arciere interacted with Binda employees and handled the final product that was being shipped to this forum. L'Arciere's handling of the final product is the alleged act of negligence that may have caused Kopke's injuries. The product was shipped here as a result of the sale agreement between Binda and CTI. As a result of this sales agreement, the cargo container arrived in Wisconsin and Kopke was subsequently injured here. These business relationships benefited L'Arciere, and L'Arciere literally "played a hand" in the product arriving in this state. Under these circumstances, we think it reasonable to conclude that the purposeful availment requirement is met and that L'Arciere has sufficient minimum contacts with this forum to be held accountable here if any negligence on its part in loading the cargo containers has resulted in damages.

¶37 In attacking this conclusion L'Arciere's principal argument is that the defendant must be aware that the product will end up in the forum state. In its view, actual knowledge of a product's destination is essential for the exercise of personal jurisdiction and that L'Arciere did not know where Neenah or Appleton are located. For his part, Kopke asserts that L'Arciere had actual or at least constructive knowledge of the products' destination, which is sufficient for the purposes of minimum contacts.

¶38 Other courts have considered an analogous argument in personal jurisdiction cases where an argument is presented distinguishing between "know" and "should have known:"

> "The traditional equivalence between "know" and "should have known" in our jurisprudence suggests that, for purposes relevant to this case, it is a distinction that makes no difference. The ultimate test of in personam jurisdiction is "reasonableness" and "fairness" and "traditional" notions of fair play and substantial justice" [*International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945)]. In applying such a test, it is a matter of common sense that there should be no distinction between "know" and "should have known." We cannot say that a potential defendant who actually knows his products will ultimately reach the forum state any more "purposefully avails itself of the privilege of conducting activities [there]," *Hanson v. Denckla*, 357 U.S. [235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283 (1958)], than a potential defendant who merely *should have known*."

Barone, 25 F.3d at 613 n.4 (quoting *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 200 (5th Cir. 1980)). We find this reasoning applicable to L'Arciere's argument concerning the distinction between "knowledge" and "actual knowledge" in this case; its argument raises a distinction that makes no difference.

¶39 Having concluded that Kopke has met his burden to establish minimum contacts for the exercise of personal jurisdiction over L'Arciere, we turn next to a consideration of the second inquiry for personal jurisdiction, application of the standard of fair play and substantial justice. The Supreme Court has identified the following factors as relevant to the analysis of whether personal jurisdiction is reasonable: (1) the forum state's interest in adjudicating the dispute; (2) the plaintiff's interest in obtaining convenient and effective relief; (3) the burden on the defendant; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and, (5) the shared interest of the several States in furthering fundamental substantive social policies. *Asahi*, 480 U.S. at 113, 107 S. Ct. 1026; *World-Wide Volkswagen*, 444 U.S. at 292, 100 S. Ct. 559. The first three factors are relevant to our analysis of this case.

¶40 As to the first factor, the State of Wisconsin has an unquestionable interest in providing its citizenry with a forum to adjudicate claims arising here.

¶41 As to the second factor, Kopke, who suffered a spinal cord injury causing permanent quadriplegia, has an undeniable interest in obtaining convenient relief. We also believe Kopke has a right to effective relief. This

point brings us to consideration of an argument presented by RAS, who asserts that basic consideration of fairness weigh in favor of dismissing L'Arciere. According to RAS, the sole reason Kopke wants L'Arciere to remain in this action is not because he believes it has any liability, but because of his concern that Binda will attempt to use L'Arciere's "empty chair" to deflect blame at trial. We are not persuaded. A strategic decision on the part of plaintiff's or defense counsel does not weigh in as a factor in our due process analysis.

¶42 The third factor which we will consider is the burden on the defendant. L'Arciere contends that it would be unfair and unjust to exercise personal jurisdiction over a party that merely packs or loads goods onto a truck or vessel. In its view, subjecting L'Arciere to jurisdiction in this forum would subject all packing and portage companies, stevedores, and longshoremen to nationwide, even worldwide, jurisdiction. In support of this position, L'Arciere cites three cases in which a court determined that the minimum contact requirement of personal jurisdiction analysis was not satisfied, *American President Lines, Ltd. v. Metropolitan Stevedore Services,* 567 F.Supp. 169 (W.D.Wash.1983); *Real Properties, Inc. v. Mission Insurance Co.,* 427 N.W.2d 665 (Minn.1988); and *Global Servicios, S.A. v. Toplis & Harding, Inc.,* 561 So.2d 674 (Fla.Ct.App.1990). Because in each of these cases the minimum contacts inquiry was not satisfied we do not have the benefit of the court's consideration of the exercise of personal jurisdiction under the "fair play and substantial justice" prong, and, therefore, these cases provide little assistance to our analysis. Nonetheless, we will briefly examine each of the three cases cited by L'Arciere.

¶43 In *American President Lines* the defendant stevedore loaded and stowed cargo onto a vessel in California. The vessel, enroute to its destination of Bhavnagar, India, arrived in Seattle. While in Seattle a negligent stow required a lengthy layover for clean-up and restowage. The federal district court determined that the exercise of personal jurisdiction in Washington State would be impermissible. First, it determined that the loading of cargo in California "not of such a nature that it can be said to put defendant on notice that it might be called to defend such actions at any port at which the vessel may call." *Id.* at 170-71. Second, the court found that "[t]he circumstance that the vessel's owner elected to dock in Seattle is insufficient to support the assertion of jurisdiction over defendant under Washington's long-arm statute." *Id.* at 171. Third, the court rejected application of the stream of commerce theory because the stevedore "did not utilize the owner of the vessel it loaded as a distributor of its 'products' and thus did not take advantage of an indirect marketing scheme and received no economic benefit, either direct or indirect, from the residents of Washington." *Id.*

¶44 In *Real Properties* the Minnesota Supreme Court found no personal jurisdiction over a New Jersey company. The New Jersey company had been hired by a Minnesota firm, Barrett Moving & Storage (Barrett), to package Chinese art pieces for shipment. The Barrett drivers loaded the crates onto Barrett trucks and Barrett hauled the goods from New Jersey to Minneapolis, Minnesota. Upon arrival in Minneapolis it was discovered that many of the art pieces were broken. In the ensuing court action, the plaintiff argued that the New Jersey

firm's negligence in packing caused the breakage. The question decided by the Minnesota Supreme Court was whether or not the New Jersey company had sufficient contacts with the forum state to permit it to exercise personal jurisdiction. *Real Properties*, 427 N.W.2d at 667. The court did not find the minimum contacts inquiry satisfied and did not analyze the "fair play and substantial justice issue."

¶45 Finally, in *Global Servicios* a Colombian corporation, working in Colombia, packed household goods and forwarded for shipment. "The goods were packed in Colombia by Global, flown to Miami by Lineas Aereas del Caribe (LAC), stored in Miami by Inter-American, and trucked to New Jersey by Pride Movers, Inc." *Id.* at 674. The goods were damaged at some point in this process. The federal district court concluded that Global did not have sufficient minimum contacts with Florida to subject it to jurisdiction in that state. The court noted that Miami is the port of entry for air cargo from Colombia. It concluded that Global's contact with Florida was "merely fortuitous and was made yet more tenuous by LAC's air transport of the goods from Bogota to Miami and by Inter-American's storage of the goods once they reached Miami." *Id.* at 675.

¶46 In the case at hand, the cargo container's arrival in Wisconsin was not "merely fortuitous" as was the passage of goods through Miami in *Global Servicios* or, arguably, the docking of a vessel in Seattle in *American President Lines*. The goods were purchased by CTI and intended for delivery in this forum; the goods did not fortuitously, randomly, or even erringly appear here. In contrast to the events in *Real Properties*, this was not a

one-time transaction. CTI had been purchasing Binda's products since 1991; L'Arciere was loading cargo containers under contract with Binda from 1996 through May of 1998. During this period, numerous cargo containers were packed by L'Arciere, destined for Wisconsin. Thus, we conclude that L'Arciere was not an anonymous entity packing goods for shipment somewhere in the global marketplace. As a result, we conclude that the mere fact that the activity L'Arciere engaged in was packing cargo containers does not automatically make the exercise of personal jurisdiction unfair. The larger question, and what we believe L'Arciere is attempting to argue, is whether a nonresident, unconsenting business entity engaged in loading or stowing goods will always avoid personal jurisdiction because it is unfair or unreasonable. We decline to adopt the "per se" analysis offered by L'Arciere.

¶47 In considering the burden on the defendant, we of course recognize that like the defendant in *Asahi*, the defendant here is located beyond our national boundaries and will have to defend itself in a foreign nation's judicial system. L'Arciere also contends that, as in *Asahi*, the real dispute is between two nonresidents, Binda and L'Arciere. The contract between Binda and L'Arciere contains a choice of forum provision and L'Arciere contends that determination of this dispute in this forum would violate that agreement. We find, however, that the feature that distinguishes *Asahi* from the case at hand is that in *Asahi*, the injured plaintiff, a California resident, was no longer a part of the action, having reached a settlement agreement. Therefore, we do not view this case as merely one between two nonresident parties. Kopke is still a

party, and very interested. Further, the facts of *Asahi* are substantially different from the present case. The Supreme Court found it unfair to exercise personal jurisdiction over a Japanese manufacturer of parts, who sold its product to a Taiwanese manufacture [sic], who subsequently incorporated those parts into a product that was sold in California. The present case does not present an analogous sale of goods scenario. Accordingly, we conclude that the unfairness found by the Court in *Asahi* is not present here.

¶48 In sum, the defendant must make a "compelling case" that other consideration make the exercise of jurisdiction unreasonable. *Burger King*, 471 U.S. at 477, 105 S. Ct. 2174. We conclude that L'Arciere has not met this burden. As a result, we affirm the circuit court and conclude that personal jurisdiction over L'Arciere is permissible under both the Wisconsin long-arm statute and the Due Process Clause of the Fourteenth Amendment. The case is remanded to the circuit court for further proceedings consistent with this opinion.

The order of the circuit court is affirmed.

¶49 *N. PATRICK CROOKS*, J. (*dissenting*). I join the dissent of Justice DIANE S. SYKES, however, I write separately as to the majority's conclusion that the evidence here establishes minimum contacts. If what the majority concludes qualifies as minimum contacts is indeed sufficient, then there is, in effect, nothing left of the doctrine of minimum contacts, which would limit the reach of a state court's jurisdiction. According to the majority, a foreign company or organization need only provide a service to establish minimum contacts, even

though the evidence presented fails to establish that that foreign company or organization had any knowledge that it was processing a product for arrival in a particular forum. *See* majority op. at ¶37. The potential implication of the majority's decision today on foreign trade is significant and cannot be ignored. Indeed, the *United States Supreme Court may need to settle finally the scope of the stream of commerce test.* The majority has woven a justification for finding that L'Arciere is subject to this state's jurisdiction, notwithstanding the limits of due process. There is very little, if anything, to tie L'Arciere to Wisconsin, certainly nothing that it "should reasonably anticipate being haled into court" here. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).[1]

¶50 I respectfully disagree with the majority's conclusion that Kopke met his burden of establishing the requisite minimum contacts between Wisconsin and L'Arciere. *Id.* at 291, 100 S. Ct. 559. I take issue, particularly, with the majority's transformation of what is, at best, a prima facie case into a presumption. The majority states that "[c]ompliance with the statute *presumes* that due process is met." Majority op. at ¶22 (citing *Lincoln v. Seawright*, 104 Wis. 2d 4, 10, 310 N.W.2d 596 (1981)). Even

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[1] In *Zerbel v. H.L. Federman & Co.*, 48 Wis. 2d 54, 60, 179 N.W.2d 872 (1970), this Court recognized that, "[a]s to the limits imposed by due-process standards, federal decisions are controlling." I agree with the majority's conclusion that the five-factor test set forth in *Zerbel* has been subsumed into due process standards adopted by the United States Supreme Court. *See* majority op. at ¶23 n.9.

if the defendant can rebut that presumption, it is a presumption nonetheless, according to the majority. *Lincoln* stated that compliance with Wisconsin's long-arm statute, Wis. Stat. § 801.05, constitutes prima facie compliance with the requirements of due process. 104 Wis. 2d at 10, 310 N.W.2d 596. *Lincoln*, however, made an unsupported conclusion that the prima facie case somehow constituted a presumption. *See id.* This is a grievous error that should not be continued.

¶51 More importantly, if compliance with the Wisconsin's long-arm statute presumably established due process, such a presumption, in and of itself, would offend due process.

> The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful "contacts, ties, or relations." Although this protection operates to restrict state power, it "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause" rather than as a function "of federalism concerns."

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 & n. 13, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (internal citations omitted). Due process limits a state's power to reach beyond its borders and take jurisdiction of those from outside of its borders. Taking the majority's presumption to its logical end, the legislature could enact a long-arm statute with no limits and then, presumptively, abrogate due process. This cannot be.

¶52 Even if the majority's conclusion that Wisconsin's long-arm statute, Wis. Stat. § 801.05(4)(b), applies to

L'Arciere's activity is correct, due process indeed limits the reach of personal jurisdiction. The limit of that reach is premised upon one of the most basic of due process rights – notice. Not notice of the impending suit, but notice that one could even be subject to a suit in the forum state.

> When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

World-wide volkswagen, 444 U.S. at 297, 100 S. Ct. 559 (quoting *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). Potential defendants must have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King,* 471 U.S. at 472, 105 S. Ct. 2174 (quoting *Shaffer v. Heitner,* 433 U.S. 186, 218, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) (Stevens, J., concurring)). The fair warning requirement is met where the defendant "purposefully directs" its activities towards forum residents. *Burger King,* 471 U.S. at 472, 473, 105 S. Ct. 2174.

¶53 As the majority acknowledges, "purposeful availment" is the main cord of the minimum contacts analysis. *See* majority op. at ¶24. "Purposeful availment" is comprised of a number of interwoven components, one of which is whether the defendant has "purposefully directed" its activities at the forum. It is on this component that a majority of the United States Supreme Court

could not agree in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).[2] In short, Justice O'Connor, speaking for a plurality of four justices, advocated a more restrictive test, by requiring specific acts by which a defendant purposefully directed its activities toward the forum state, in addition to the defendant's awareness *and* placement of a product into the stream of commerce. *Id.* at 112, 107 S. Ct. 1026. Justice Brennan, speaking for a plurality of four other justices, disagreed. As the majority of this court noted (at ¶29), Justice Brennan concluded that so long as there is "regular and anticipated flow of products from manufacturer to distribution to retail sale," and the defendant "is *aware* that the final product is being marketed in the forum State," the defendant benefits "from the State's laws that regulate and facilitate commercial activity," including the sale of the product, "the possibility of a lawsuit there cannot come as a surprise." *Asahi*, 480 U.S. at 117, 107 S. Ct. 1026 (Brennan, J., concurring). The majority here adopts Justice Brennan's approach, relying upon *Dehmlow v. Austin Fireworks*, 963 F.2d 941 (7th Cir. 1992), even though *Dehmlow* also examined whether the jurisdictional facts satisfied Justice O'Connor's test "in recognition of the recent split of Supreme Court authority on this issue." *Id.* at 947. Nonetheless, assuming, *arguendo*, that Justice Brennan's approach, which pertains to the sales and distribution of goods,

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[2] The United States Supreme Court has not extensively analyzed the "purposefully directed" component of the due process minimum contacts test since *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

rather than providing a service (*see Asahi*, 480 U.S. at 117, 107 S. Ct. 1026 (Brennan, J., concurring)), applies here,[3] the exercise of personal jurisdiction in this case would violate due process.

¶54 Here, there is nothing that suggests that L'Arciere purposefully directed any activity toward Wisconsin which would establish minimum contacts. It is undisputed that L'Arciere has not, and does not, do business in Wisconsin. It has no office, employees, or property in Wisconsin. It does not advertise or otherwise solicit business in Wisconsin. It did not create or control Binda's distribution system that brought the paper to Wisconsin. Nor is there evidence that L'Arciere processed the paper for its sale in Wisconsin. Binda paid L'Arciere for labor regardless of when, where, or even if the paper was delivered.

¶55 The majority relies upon three factors that it concludes establishes L'Arciere's minimum contacts with Wisconsin and each fails to establish such. The first is L'Arciere's contract with Binda. *See* majority op. at ¶33.[4]

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[3] The majority glosses over this point, summarily concluding that the due process analysis from cases which involve strict products liability claims applies here because "Kopke's injuries arose out of commercial activities." Majority op. at ¶31. I am not persuaded. Even under the majority's test, which presumably is the one most favorable to its conclusion, exercising personal jurisdiction over L'Arciere runs afoul of due process.

[4] Also, the majority contends (*id.* ¶33), this case is not like *Asahi*. I agree. We do not have before us a manufacturer as the defendant, which shipped the allegedly defective part to another international forum, which, in turn, was incorporated

The United States Supreme Court stated clearly in *Burger King* that a contract alone does not establish minimum contacts. 471 U.S. at 478, 105 S. Ct. 2174. Moreover, the contract was between two Italian companies. There is no evidence that L'Arciere, at any time, contracted with a Wisconsin company. The fact that L'Arciere employees worked with Binda employees does not establish the requisite awareness that L'Arciere was purposefully making contact with this forum. *See* majority op. at ¶33. There certainly does not appear to be any "purposeful availment."

¶56 Second, the majority relies upon the loading instructions which "identified the container's destination." Majority op. at ¶34. According to the majority, these instructions show that the paper products L'Arciere packed for Binda "were specifically intended to arrive in this forum." *Id.* The loading instructions prove no such thing. These one-page, handwritten instructions detail the calculations of the weight of the containers and sketch the placement of the containers. They also state, "x [to] CTI," "x [to] Appleton," and "x [to] Neenah." Nowhere is there any indication that CTI, Appleton, or Neenah are located in the United States, let alone in Wisconsin.

¶57 Third, the majority relies upon evidence that at least 40 containers were loaded by L'Arciere for delivery to Wisconsin. Majority op. at ¶35. This evidence comes from damage reports CTI completed when it received the

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into the product that was shipped into the forum state. *Asahi*, 480 U.S. at 105-107, 107 S. Ct. 1026. This distinction, however, is immaterial to L'Arciere's contract with Binda, which hardly establishes a contact with this state.

shipments from Binda. *Id.* at ¶35. These reports record damage that apparently occurred in shipment, noting where the containers were "scraped," or "dirty," or "corner gouged." However, these reports do not, and could not, establish, *ex post facto*, that L'Arciere was aware that those containers were headed for Wisconsin. It is this thread, L'Arciere's supposed awareness, which, when pulled, unravels the majority's conclusion.

¶58 Under either Justice O'Connor's or Justice Brennan's test for whether a defendant has purposefully directed its acts towards the forum state, the defendant must be *aware*, at a minimum, that its product could reach the forum state. *See Asahi*, 480 U.S. at 105, 107 S. Ct. 1026; *see also id.* at 117, 107 S. Ct. 1026 (Brennan, J., concurring). This relates back to the due process requirement that the defendant must have " 'clear notice that it is subject to suit' in the forum," and that it is thus afforded an "opportunity to 'alleviate the risk of burdensome litigation.' " *Burger King*, 471 U.S. at 476 n.17, 105 S. Ct. 2174 (quoting *World-Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. 559). Awareness exists, for example, where the defendant "delivers its products into the stream of commerce with the *expectation* that they will be purchased by consumers in the forum State." *World-Wide Volkswagen*, 444 U.S. at 298, 100 S. Ct. 559 (emphasis added).

¶59 Based on the information presented, it is reasonable to conclude that L'Arciere had neither the awareness nor the expectation that the paper products it packed would be shipped to Wisconsin. There is no indication that L'Arciere knew specifically that some were destined for Wisconsin. None of the loading plans produced by Binda contained the words "Wisconsin" or "U.S.". Other

plans refer only to "Neenah," "Appleton," or only to "CTI." As L'Arciere pointed out in its brief before this court:

> There are no less than three Neenahs in the United States (one apiece in Alabama, Virginia, and Wisconsin); two dozen Appletons within and without the United States; and literally hundreds of locations around the world where one may find corporations in whose name the letters "CTI" play a prominent part.

Br. of Def.-Appellant at 27. These references to "Neenah," "Appleton," and "CTI" cannot establish minimum contacts. Also, presumably, had L'Arciere been aware that its packing of paper might "create a 'substantial connection' with" Wisconsin (*Burger King*, 471 U.S. at 475, 105 S. Ct. 2174 (citation omitted)), L'Arciere might have procured insurance to alleviate the risk of litigation. *World-Wide Volkswagen*, 444 U.S. at 297, 100 S. Ct. 559. However, it is undisputed that L'Arciere's liability insurance coverage specifically excluded the United States and Canada. L'Arciere, since it appears to have been unaware of the risk, could not assess that risk.

¶60 To find the requisite awareness, the majority adopts Kopke's argument that L'Arciere had "constructive knowledge" that the paper was being shipped to Wisconsin. We should be wary of an attempt to reach beyond the limits of due process based upon such a contention. First, Kopke points to no evidence which would establish that L'Arciere should have known the containers were headed here. Second, and more importantly, the purportedly "analogous" cases are wholly inapposite. *See* majority op. at ¶38. *Barone v. Rich Bros.*

Interstate Display Fireworks Co., 25 F.3d 610 (8th Cir. 1994) and *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980) both involve distribution contracts under which the defendants were reasonably aware, or even expected, that their product would reach the forum state. In *Barone*, the Eighth Circuit found that Nebraska could exercise personal jurisdiction over Hosoya Fireworks Co. of Tokyo, Japan, consistent with due process. 25 F.3d at 610-611. This was due to the distribution agreement Hosoya had with Rich Bros. "Hosoya certainly benefited from the distribution efforts of Rich Bros., and although Hosoya claims to have had no actual knowledge that Rich Bros. distributed fireworks into Nebraska, such ignorance defies reason and could aptly be labeled 'willful' " *Id.* at 613 (footnote quoted by the majority at ¶38 omitted).[5]

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[5] It is noteworthy that *Barone* referred to *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986), "that appears to be on all fours with the case before" the *Barone* court. *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 612 (8th Cir. 1994). *Giotis* determined that a Wisconsin court would have jurisdiction over Missouri defendants in their role as heads of a distribution network. 800 F.2d at 662, 667-668. *Giotis* explained the economic context of a distribution network, which would give rise to finding that a manufacturer, or seller, should be aware that its product might reach, and thus establish a contact with, any number of states.

> [T]he seller-defendant, particularly if at the head of a distribution network, realizes the much greater economic benefit of multiple sales in distant forums, of which the purchase by the particular buyer who has brought suit is merely one example. A seller, since it realizes this greater economic benefit, may more easily satisfy the purposeful availment test and be sued by a buyer in the buyer's forum than a buyer may be sued by the seller in the seller's forum. This is

Similarly, in *Oswalt*, the Fifth Circuit found that the defendant should have known that its products would be marketed and sold in the forum state, Texas, based upon the defendant's exclusive distribution arrangement. 616 F.2d at 199-200. "[T]he record shows that [the defendant] had every reason to believe its product would be sold to a nation-wide market, that is, in any or all states." *Id.* at 200. To the contrary here, there is nothing in the record which would have given L'Arciere reason to believe that, due to a distribution agreement it had with a distributor in the United States, the paper it packed would end up in Wisconsin. The cases wherein constructive knowledge established awareness, sufficient to establish personal jurisdiction, rest upon an entirely different relationship between the defendant and the forum state, than the one we have here.[6] That distribution link between L'Arciere and Wisconsin does not exist here. In fact, no meaningful link exists between the two.

> especially true where the seller is at the head of a distribution network and thus even more clearly has "purposefully availed" itself of the economic benefits of selling to buyers in distant forums.

Id. at 667 (footnote and citations omitted). Clearly, we do not have this same economic framework here, making the "should have known" test for awareness inapplicable. L'Arciere is not a seller-defendant, and certainly is not at the head of a distribution network.

[6] Visibly missing from the cases relied upon by the majority is a truly analogous case where personal jurisdiction has been exercised over a non-resident defendant, based solely upon that defendant's preparation of goods to be shipped by another to the forum State.

¶61 The majority attempts to create a link, however, a link through Binda's contacts with Wisconsin. According to the majority,

> L'Arciere, by virtue of its business relationship with Binda, benefited from the distribution of Binda products to this forum. "A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity." *Asahi*, 480 U.S. at 117, 107 S. Ct. 1026 (Brennan, J., concurring).

Majority op. at ¶36. However, L'Arciere did not benefit economically from the fact that the paper it packed was delivered to Wisconsin. Binda did. L'Arciere economically benefited from packing the paper. L'Arciere did not, in any way, depend upon Wisconsin for any economic benefit. It would have been paid to pack the paper, whether that paper was sent to Wisconsin or to Paris, France, or Paris, Texas. Such is evident from L'Arciere's contract with Binda, which did not specify that its work, or payment, was dependent upon the destination of the cargo. Indeed, L'Arciere failed to " 'purposefully derive [any] benefit' " from Wisconsin. *Burger King*, 471 U.S. at 473, 105 S. Ct. 2174.

¶62 "[I]t is essential in each case that there be *some act* by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 475, 105 S. Ct. 2174 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958) (emphasis added)). Another strand in the cord of

"purposeful availment," in addition to the defendant's awareness, is the defendant's conduct that indicates that the defendant is availing itself of the benefit of the forum state, so that it would reasonably anticipate litigation there. *Burger King*, 471 U.S. at 474, 105 S. Ct. 2174. Here, however, there is admittedly no such conduct by L'Arciere, and the majority refers only to the contract between Binda and L'Arciere, the loading instructions, and the damage reports. *See* majority op. at ¶¶33-35.

¶63 That the majority is creating a minimum contacts test based upon foreseeability is evident from its reliance upon Kopke's allegation that L'Arciere negligently loaded the pallet containing the paper, which injured Kopke when he opened it. Majority op. at ¶¶31, 33. The premise for the majority's reliance upon Kopke's allegation is that if L'Arciere negligently packed the paper, it was foreseeable that he would be injured in Wisconsin. This approach was plainly rejected by the United States Supreme Court in *World-Wide Volkswagen*. There, the Court held that jurisdiction in Oklahoma cannot be based upon "the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma," even though it had been argued that the injury in Oklahoma was foreseeable because the Audi was mobile. *World-Wide Volkswagen*, 444 U.S. at 295, 100 S. Ct. 559. "If foreseeability were the criterion . . . a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey. . . . " *Id.* at 296, 100 S. Ct. 559 (citation omitted). Indeed, *World-Wide Volkswagen* stands for the proposition that neither injury nor causation establishes personal

jurisdiction. An allegation regarding causation is not a jurisdictional fact, and I note that the majority fails to rely upon any cases in seeming to so hold that it is.

¶64 What remains as the contact between L'Arciere and Wisconsin is only the link created by Binda and CTI, specifically that "not insignificant volume of business between CTI and Binda." Majority op. at ¶32. The amount of business between two third-parties has never been the basis of a court's exercise of personal jurisdiction. Again, the majority is relying upon a foreseeability minimum contacts test, in order to assert Wisconsin's jurisdiction over L'Arciere, and such an approach is dependent upon L'Arciere foreseeing, or, in the words of the majority, "*expect[ing]*" that the paper it packed "arrive" in Wisconsin. Majority op. at ¶32 (emphasis added). However, " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295, 100 S. Ct. 559.

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. The Due Process Clause, by ensuring the "orderly administration of the laws," gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

Id. at 297, 100 S. Ct. 559 (citations omitted). Here, the requisite foreseeability, inextricably linked to the notice element of due process, is ostensibly missing. There is very little, if anything, that would put L'Arciere on notice that it was handling a product that was intended for Wisconsin. There was nothing that would have led to the prediction that their packing of containers headed for a "Neenah" or an "Appleton" would result in defending an action in Wisconsin, or even in the United States. L'Arciere would have had to have known that Appleton and Neenah were located in Wisconsin. The contact, established only through Binda, "is far too attenuated a contact to justify [this] State's exercise of *in personam* jurisdiction over" L'Arciere. *Id.* at 299, 100 S. Ct. 559.

¶65 Even under Justice Brennan's less restrictive stream of commerce test in *Asahi*, the necessary minimum contacts are not found here. The majority, in finding to the contrary, rents [sic] the fabric of due process. If, as the majority concludes, the jurisdictional facts in this case establish minimum contacts, little predictability remains for potential plaintiffs and defendants in the present world economy. Perhaps, it is time for the United States Supreme Court again to provide guidance as to the scope of due process as related to minimum contacts. For the reasons stated herein, I respectfully dissent.

¶66 I am authorized to state that Justice JON P. WILCOX and Justice DIANE S. SYKES join this dissent.

¶67 *DIANE S. SYKES*, J. (*dissenting*). I join Justice Crooks' dissent. I agree that Wisconsin's long-arm statute, Wis. Stat. § 801.05(4)(b), has been satisfied, but that

due process precludes the assertion of personal jurisdiction over L'Arciere. I write separately because I disagree with the majority's adoption of the Seventh Circuit's interpretation of the statute in *Nelson v. Park Industries, Inc.*, 717 F.2d 1120 (7th Cir. 1983).

¶68 In *Nelson*, the Seventh Circuit held that the statute's reference to "products . . . processed . . . by the defendant [and] used or consumed within this state" included the actions of a foreign distributor who did nothing more than buy and resell goods. *Id.* at 1124. I am not fully convinced that the transactional act of buying and reselling a product in the ordinary course of trade constitutes "processing" for purposes of our long-arm statute. But that issue need not be decided here, and so I would not adopt *Nelson's* interpretation of the statute.

¶69 Instead, I would conclude that the particularized packaging procedure carried out by L'Arciere employees constituted "processing" as that term is commonly and ordinarily understood. "To process" is "to treat or prepare by a special method." *Funk & Wagnalls New International Dictionary of the English Language* 1005 (Comprehensive Millennium Ed. 2000).

¶70 L'Arciere employees packaged and secured the paper pallets for shipment in cargo containers according to a detailed method – complete with bracing beams, boards, and inflated air bags – prescribed by Binda's loading plans. This is a form of "processing." As such, the long-arm statute has been satisfied, although the requirements of due process have not, for the reasons stated by Justice Crooks. Accordingly, I join his opinion, and respectfully dissent.

¶71 I am authorized to state that Justices JON P. WILCOX and N. PATRICK CROOKS join this dissenting opinion.

Supreme Court, U.S.
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NO. 01-548

IN THE
SUPREME COURT OF THE UNITED STATES

SOCIETÀ COOPERTIVA L'ARCIERE,
Petitioner,

v.

TIMOTHY J. KOPKE, et al.,
Respondents.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY RESPONDENT RIUNIONE ADRIATICA di SICURTÀ S.p.A.

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CORPORATE DISCLOSURE STATEMENT

Respondent Riunione Adriatica di Sicurtà S.p.A. ("RAS") is an Italian insurance company. RAS's parent company is Allianz AG, a German corporation that is publically held. There are no other publically held companies that own 10% or more of RAS's stock.

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Respondent Riunione Adriatica di Sicurtà, S.p.A. ("RAS"), respectfully submits this brief in support of Petitioner Società Coopertiva L'Arciere's ("L'Arciere's") petition for a writ of certiorari to review a judgment and opinion of the Supreme Court of Wisconsin, dated July 10, 2001.

STATEMENT OF THE CASE

RAS believes that L'Arciere has, for the most part, adequately and accurately set forth the nature of this case, the procedural history leading up to its petition, and the pertinent facts. RAS would add, for the benefit of the Court, that it is an Italian insurance company with its principal place of business in Milan, Italy. R. 25, ¶ 7. RAS issued an insurance policy, in Italy, to the predecessor of Respondent Cartiere Binda in Liquidazione S.p.A. ("Binda"), which is the subject of a coverage dispute between the two parties. *See generally* RR. 19 and 25.

Binda is currently attempting to use the decision being challenged by L'Arciere to support Binda's efforts to overturn the trial court's dismissal of RAS on jurisdictional grounds. Binda's separate appeal has been fully briefed and is currently awaiting disposition by the Wisconsin Court of Appeals as Appeal No. 00-3008. Given the potential for the Wisconsin Supreme Court's decision to be used against RAS in connection with Binda's appeal, and because of the decision's adverse implications for many of RAS's insureds, RAS has elected to file this brief in support of L'Arciere's petition.

REASONS FOR GRANTING THE WRIT

In Wisconsin the doctrine of minimum contacts has been swept away by a stream of commerce theory that has flooded its conceptual banks. *See Kopke v. A. Hartrodt S.r.l.*, 2001 WI 99, ¶ 49, 245 Wis. 2d 396, 629 N.W.2d 662 ("If what the majority concludes qualifies as minimum contacts is indeed sufficient, then there is, in effect, nothing left of the doctrine of minimum contacts, which would limit the reach of a state court's jurisdiction.") (Crooks, J., dissenting).

While the majority's aggressive application of the stream of commerce theory in this case could well establish its high water mark, other jurisdictions throughout the country have adopted similarly expansive formulations of the rule. To be sure, there exist jurisdictional "safe harbors," courts which require something more than a vague, constructive awareness that a potentially injury producing article that a party is handling may be destined for the forum before imposing on it the considerable burdens of defending a case in a foreign legal system. However, this patchwork approach frustrates commercial enterprises–especially those operating entirely in other countries, as here–from charting out their business activities in a predictable way, one which will provide them with a reasonable measure of confidence where they are likely to be amenable to suit.

The courses that the stream of commerce theory has run in the wake of this Court's decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) have been many and varied. *See* L'Arciere's Petition at 7 (cataloging various contexts in which the theory has been employed). The time has

come for this Court to intervene and limit the course of the stream of commerce theory so as to prevent it from submerging much of the personal jurisdiction landscape in what might be better termed an "ocean of commerce" theory. By doing so the Court can restore order and predictability to a vital body of law, one whose ripple effects extend across an ever expanding and increasingly interconnected global economy. The Court can also thereby foster more harmonious foreign relations between our nation and the rest of the international community.

I.

IT IS IMPERATIVE THAT THIS COURT RESOLVE THE SPLIT IN AUTHORITY ON THE STREAM OF COMMERCE THEORY OF PERSONAL JURISDICTION TO RESTORE ORDER AND PREDICTABILITY TO THIS VITAL BODY OF LAW.

The split in authority on the nature and scope of the stream of commerce theory is well documented. Indeed, more than 14 years ago in *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987) this Court itself highlighted the then present differing interpretations of the theory that had emerged in the aftermath of *World-Wide Volkswagen*. *Asahi*, 480 U.S. at 110-11; *see also Ruckstuhl v. Owens Corning Fiberglas Corp.*, 731 So. 2d 881, 887 n.5 (La. 1999) (collecting divided federal circuit court cases). These conceptual rifts remained after *Asahi* given the Court's inability to agree on the proper formulation and application of the theory in that case.

To be sure, *Asahi* has engendered more questions than it has answered, especially on the stream of commerce front. Some jurisdictions, such as Wisconsin, now view the stream of

commerce language from *World-Wide Volkswagen* as entrenched dogma. *See Kopke*, 2001 WI 99, ¶ 30 ("[A] majority of the Court has not rejected the stream of commerce analysis of *Burger King* and *World-Wide Volkswagen*, and it is thus binding on the lower courts.") (emphasis added). Other jurisdictions refuse to treat this language with such reverence; the Louisiana Supreme Court observing in *Ruckstuhl*, *supra*, that:

> [T]he stream of commerce theory with regard to manufacturers is dicta in *World-Wide Volkswagen* and is not binding law. Further, the attempted modification [stream of commerce plus theory] led by Justice O'Connor in *Asahi* did not receive enough votes to make it law. Therefore, **we have no Supreme Court precedent that guides us as to which theory, if either, represents the law**.

Ruckstuhl, 731 So. 2d at 889 (emphasis added).

In point of fact, the business world has been set adrift in a jurisdictional ship without a functioning compass to attempt to navigate the many tributaries of the stream of commerce theory now extant. Given the uncertainty involved, it should come as no surprise that businesses all too frequently find themselves running hard aground, as here. And, as this case illustrates, those tributaries are proliferating as courts broaden the contexts in which they apply the theory.

This is not a garden variety product liability suit, the wellspring from which the stream of commerce theory first

issued. *See World-Wide Volkswagen*, 444 U.S. at 297. Rather this case arises out of a purportedly negligently performed service, *i.e.*, the allegedly improper packing of Binda's paper in an intermodal container. The distinction is crucial. For the legitimacy of the stream of commerce theory as articulated in *World-Wide Volkswagen* is drawn from a manufacturer's or distributor's ability to *control* the marketing and sale of the product at issue. *See id.* ("if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its **products** in other States, it is not unreasonable to subject it to suit in one of those States") (emphasis added). One of the two dissenting opinions below highlighted this key distinction in underscoring the lack of any such "distribution link" here. *Kopke*, 2001 WI 99, ¶ 60 & n.5; *see also id.* at ¶¶ 53-54 & n. 3 (noting that the majority "glosses over this point" and pointing out that "L'Arciere did not create or control Binda's distribution system that brought the paper to Wisconsin") (Crooks, J., dissenting).

Other courts have been more careful to maintain the conceptual levees that keep the stream of commerce theory running true. Illustrative of these decisions is *Considine v. West Point Diary Products, Inc.*, 111 N.C. App. 427, 432 S.E.2d 412, *dismissal allowed and rev. denied*, 335 N.C. 171, 438 S.E.2d 197 (1993). There a Florida truck driver brought suit in North Carolina state court against a Nebraska dairy for injuries he sustained when several boxes of allegedly improperly loaded butter fell on him when he was attempting to make a delivery. The plaintiff asserted that the defendant was subject to suit under the stream of commerce theory, "because defendant knew

its product was going to North Carolina, evidenced by the fact that defendant filled out the bill of lading to North Carolina. Also, according to plaintiff, 21 other shipments of butter from defendant's dairy had found their way to North Carolina." *Id.* at 430, 432 S.E.2d at 414. In rejecting this argument the North Carolina Court of Appeals reasoned:

> We agree with the trial court that the "stream of commerce" analysis does not apply here. The cases which have applied the stream of commerce theory have been products liability cases, wherein a potentially defective and dangerous product has been injected into the stream of commerce. *See, e.g., Cox v. Hozelock, Ltd.*, 105 N.C. App. 52, 411 S.E.2d 640, *disc. rev. denied and appeal dismissed*, 331 N.C. 116, 414 S.E.2d 752, *and cert. denied*, 506 U.S. 824, 113 S.Ct. 78, 121 L.Ed.2d 42 (1992) (assertion of personal jurisdiction over defendant English company which had manufactured defective water sprayer, then sold its product to distributors and eventually to the North Carolina plaintiff, who was injured when it exploded in his face). The case at hand is not a products liability case. Plaintiff does not allege that the butter itself was defective in any way. Instead, plaintiff's claim is based on one alleged incident of negligence in loading the butter onto a truck in Nebraska.

111 N.C. App. at 430, 432 S.E.2d at 414.

Notably, in *Considine* it was a third party broker that was directing the distribution of the goods at issue, not the dairy. *See id.* at 428, 432 S.E.2d at 413 ("Plaintiff's trucking company was hired by a third party broker, Bert Lewis of Oakbrook, Illinois, to transport his purchase of butter from defendant's dairy to Lewis' subsequent buyers, the Campbell Soup Company in Maxton, North Carolina.").

Similarly, in *Haley v. Champion Int'l Corp.*, NO. 99-2256-JWL, 2000 WL 1472880 (D. Kan. Apr. 21, 2000) the district court recognized, in declining to exercise jurisdiction, that the allegedly negligent packer had no say in where the purportedly injurious goods were being directed. As in *Considine*, the plaintiff was a truck driver (like Respondent-Plaintiff Timothy Kopke), who was injured when his tractor-trailer overturned in route from Texas to Kansas. He asserted that Dungan Warehouse Corporation caused his accident by improperly loading his trailer with paper under the negligent supervision of the paper manufacturer, Champion International Corporation. The court found that due process limitations did not permit it to exercise jurisdiction over Dungan even though it knew the cargo's destination. In so holding, the court reasoned that:

> Dungan is a warehouse in Texas. It stores paper, which it loads and unloads onto trailers in Texas. Dungan does not direct where the paper it handles arrives from or departs to, nor is its business concerned with such locations. In this case Champion, not Dungan, determined that the paper would travel to Kansas. Plaintiff has alleged no facts which would indicate that

> Dungan made any purposeful contact with Kansas.

2000 WL 1472880, at *3. *Accord Eggear v. The Shibusawa Warehouse Co., Ltd.*, NO. CIV. A. 00-CV-4636, 2001 WL 267881, at * 1 (E.D. Pa. Mar. 19, 2001) ("The only contact that Plaintiffs allege that Shibusawa has with Pennsylvania is that Shibusawa is aware that ships that it loads in Japan are unloaded in Pennsylvania. This type of contact is insufficient to establish personal jurisdiction over Shibusawa."); *see also id.* at *3 ("'It is uncontroverted that defendants have no interest in or control over the ultimate destination of cargo loaded onto these ships.'") (quoting *Irby v. Isewan Terminal Services. Co., Ltd.*, NO. 90-2210, 1991 U.S. Dist. LEXIS 18480, at *5-*6 (E.D. Pa. Dec. 18, 1991)).

There is no principled basis for distinguishing cases such as *Considine*, *Haley*, and *Shibusawa* from this case–nor did the Wisconsin Supreme Court even try. Presumably, had this case been brought in either North Carolina state court, Kansas federal court, or the Eastern District of Pennsylvania, L'Arciere would have been dismissed under the foregoing authority. To be sure the facts of this case present an even more extreme situation than encountered in those cases, as Kopke has presented no evidence from which it can be reasonably inferred that L'Arciere should have known, much less actually knew, the destination of the subject containers. *See Kopke*, 2001 WI 99, ¶ 60 ("Kopke points to no evidence which would establish that L'Arciere should have known the containers were headed here.") (Crooks, J., dissenting). Whereas in all three of these other cases there is proof that the defendants knew where the

cargo was being shipped, yet they were still dismissed for lack of jurisdiction.

The uneven application of the stream of commerce theory and due process jurisprudence is vividly shown by the opposing results found in these four highly analogous cases. This unevenness in the law makes it virtually impossible to predict where foreign companies might be amenable to suit–an impediment that handicaps not only the business world in ordering its affairs, but unduly complicates litigation for prospective plaintiffs as well. *See Kopke*, 2001 WI 99, ¶ 65 ("If, as the majority concludes, the jurisdictional facts in this case establish minimum contacts, little predictability remains for potential plaintiffs and defendants in the present world economy.") (Crook, J., dissenting). This is the antithesis of an "orderly administration of the law," which this Court has recognized time and again as the goal of the due process clause. *See World-Wide Volkswagen*, 444 U.S. at 297 (emphasis added), where this Court explained that:

> **The Due Process Clause, by ensuring the "orderly administration of the laws,"** *International Shoe Co. v. Washington*, 326 U.S. at 319, 66 S.Ct. at 159, **gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.**
>
> **When a corporation "purposefully avails itself of the privilege of conducting activities**

> **within the forum state,"** *Hanson v. Denckla*, 357 U.S., at 253, 78 S.Ct., at 1240, **it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation** by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

In the wake of *Asahi,* with its lack of any guiding light, litigants have been left adrift in an uncertain and increasingly turbulent stream of commerce that is frustrating the "clear notice" purpose of personal jurisdiction jurisprudence. Absent a legal beacon clearly defining when defendants may be subject to jurisdiction in this nation's courts, it will be "impossible for [them] to plan and structure their business contacts and risks." *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995). L'Arciere's situation drives this point home. It made a conscious decision not to obtain insurance for claims in the Unites States or in Canada, clearly not expecting that merely by loading containers according to Binda's preordained plan would it be subjected to suit wherever Binda chose to direct its shipments of paper. Yet notwithstanding these efforts to "structure its primary conduct," L'Arciere is being hauled into Wisconsin state court based, not on its own decision to market its services to Wisconsin consumers, but because Binda independently chose to tap into the State's market for Binda's paper goods.

It seems unfathomable that the message this Court wants delivered abroad is that all foreign companies–no matter how tangentially they are involved with the shipment of goods to

America–need to insure against the potential risk of being sued here. That is why the majority's decision below cannot stand. This Court is the only tribunal that can provide the sorely needed legal beacon to guide all litigants who endeavor to navigate America's turbulent jurisdictional waters, and stem the flood tide of the rising stream of commerce theory, which threatens to wash away the doctrine of minimum contacts. This Court needs to restore order and predictability to this vital body of law.

II.

THE MAJORITY'S DECISION IGNORES THE OMINOUS FOREIGN RELATIONS IMPLICATIONS ASSOCIATED WITH THE EXPANSIVE JURISDICTIONAL RULE IT ADOPTS.

While there was disagreement over the stream of commerce theory in *Asahi*, the Court was unified in concluding that it would be unreasonable to exercise jurisdiction over the foreign third-party defendant, Asahi. Writing for eight members of the Court, Justice O'Connor counseled that:

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal interest in Government's foreign relations policies will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal

> interests on the part of the plaintiff or the forum State. **"Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."** *United States v. First National City Bank*, 379 U.S. 378, 404, 85 S.Ct. 528, 542, 13 L.Ed.2d 365 (1965) (Harlan, J., dissenting).

480 U.S. at 115 (citation omitted; emphasis added).

Unfortunately, the majority below failed to heed this admonition in asserting jurisdiction over L'Arciere. Indeed, an examination of its application of the five reasonableness factors this Court articulated in *Asahi* reveals the majority's patent disregard for any adverse foreign relations impact associated with its decision.

Of the five factors (*i.e.*, (1) the forum state's interest in adjudicating the dispute; (2) the plaintiff's interest in obtaining convenient and effective relief; (3) the burden on the defendant; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and, (5) the shared interest of the several States in furthering fundamental substantive social policies), the majority below considered only the first three. None of these factors address systemic concerns that transcend Wisconsin's borders; concerns that are embodied in factors four and five, which the majority conspicuously avoided discussing. For all one can discern in reading the majority's decision, the court simply did not care what foreign relations fallout might result from its holding.

As L'Arciere expressed in its petition, the foreign relations fallout from overly aggressive jurisdictional rules can range from foreign court's refusing to recognize judgments from our nation's courts when parties seek to enforce them abroad, to outright political, legal, and economic reprisals. L'Arciere's Petition at 17. Should the former prevail, all of the parties to the dispute would be unfairly penalized by a jurisdictional system that would be dysfunctional on both ends. On the front end, foreign defendants would bear the inordinate costs and practical burdens associated with defending themselves on foreign soil under a foreign legal system. On the back end, plaintiffs, who depend on the recognition of domestic judgments when investing heavily in pursuing their cases against foreign companies, would have the rug pulled out from under them at the last moment, adding insult to injury. Plainly such an approach would be unsatisfactory, yet it is an all too real possibility when courts become overzealous in their efforts to cater to parochial interests, as occurred here.

The risk of provoking reprisals in the international community is made all the more indefensible when one considers the dearth of any substantial parochial interests at stake here. In order to properly appreciate the straw man nature of the interests the majority identified under the first three reasonableness factors, one must first recognize a fallacious assumption that was woven into its discussion on the stream of commerce theory. In concluding that the theory should apply even though the court recognized that the case was not one involving products liability, the majority pointed out that "Kopke asserts that L'Arciere workers in Italy negligently loaded the pallet into the container that was shipped to this forum." *Kopke*, 2001 WI 99, ¶ 31. While that was certainly

true when Kopke initially joined L'Arciere, it was a position that he had abandoned long before the Wisconsin Supreme Court considered this appeal. Indeed, Kopke did not oppose L'Arciere's summary judgment motion on the merits, which it brought in conjunction with its motion to dismiss for lack of jurisdiction. *See* R. 52 (Kopke's response brief), p.4 ("Binda, not L'Arciere, is solely liable for the injuries sustained by Timothy Kopke") (emphasis added). Consequently, one is left to wonder how keeping L'Arciere in the case could vindicate Kopke's interest in obtaining effective relief, or how Wisconsin could have an "unquestionable interest" in providing Kopke with a forum to not assert liability against L'Arciere. *See Kopke*, 2001 WI 99, ¶¶ 40-41.

Kopke's abandonment of his claim against L'Arciere also undercuts the majority's attempt to distinguish this case from the reasonableness dynamics at play in *Asahi*, where all that remained at issue was a dispute between two foreign defendants over their relative fault under an indemnification agreement. *See id.* at ¶ 47 ("Kopke is still a party, and very interested" as opposed to the plaintiff in *Asahi,* who had settled out of the case). If Kopke were still interested in his claim against L'Arciere, he has a peculiar way of showing it.

In reality, the sole reason that Kopke wants to keep L'Arciere in this case is not because he thinks it has any liability, but because of his concern that Binda will attempt to use L'Arciere's "empty chair" to deflect blame at trial. *See* R. 52, p.4 ("Binda refuses to withdraw its affirmative defenses and stipulate to the dismissal of L'Arciere on the merits. . . If L'Arciere is dismissed solely on jurisdictional grounds, Binda will have the opportunity at trial to attempt to shift blame for

this accident to L'Arciere. L'Arciere will not be there to defend itself. There will be only an 'empty chair,' offering no defense to Binda's claims of L'Arciere negligence.").

This purported "empty chair" impediment is more apparent than real Empty chair defendants are not an uncommon phenomenon in Wisconsin. Unlike some states, Wisconsin law permits, for example, a worker's employer from being named on the verdict as a potential tortfeasor in a product liability suit brought by the employee against a machine manufacturer–even though the employer is immune from liability by virtue of worker's compensation law. *See, e.g., Matthies v. The Positive Safety Mfg. Co.*, 2001 WI 82, ¶ 24, 244 Wis. 2d 720, 741-42, 628 N.W.2d 842, 853-54 (discussing employer's immunity), and *Martz v. Trecker*, 193 Wis. 2d 588, 535 N.W.2d 57 (Ct. App.), *rev. denied*, 537 N.W.2d 571 (Wis. 1995), where the Wisconsin Court of Appeals stated:

> It is well-established that "when apportioning negligence a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or because of a prior release.

Id. at 597, 535 N.W.2d at 61 (quoting *Connar v. West Shore Equip.*, 68 Wis. 2d 42, 44-45, 227 N.W.2d 660, 662 (1975)).

Given this legal climate, plaintiffs attorneys in Wisconsin are accustomed to compensating for the "real" defendant's efforts to slough off fault onto an absent party. To

be sure, Kopke has ready means of doing that here. He has retained experts who are well versed in what L'Arciere's and Binda's workers did and did not do in connection with the subject intermodal container given the depositions that he took of representatives from both companies. *See* R. 52, p.4 ("based on their testimony, and the documents produced . . . plaintiff is satisfied that L'Arciere loaded the container in conformity with Binda's written instructions"). Armed with this testimony, there is no reason why Kopke and his experts will be unable to effectively rebut Binda's efforts to advance L'Arciere's fault as a cause with L'Arciere absent at trial.

The majority's response to all of this below was: "A strategic decision on the part of plaintiff's or defense counsel does not weigh in as a factor in our due process analysis." *Kopke*, 2001 WI 99, ¶ 41. Such an approach exalts form over substance by using an abandoned claim to artificially generate forum and litigant interests.

Instead of recognizing Kopke's nonexistent claim against L'Arciere for what it is, the majority below has constructed a straw man to prop up its interests analysis. This myth should not be the tail that wags the jurisdictional dog. Make no mistake, this emperor is not clothed with any legitimate forum or party interests.

CONCLUSION

This case presents a golden opportunity for the Court to mend the conceptual rifts in the stream of commerce theory that have plagued lower courts and litigants alike for the better part of two decades. The time is indeed ripe for "the United States

Supreme Court . . . to settle finally the scope of the stream of commerce test." *Kopke*, 2001 WI 99, ¶ 49 (Crooks, J., dissenting) (emphasis original).

Absent the Court's intervention, lower courts will continue to expand the theory's reach further and further beyond its legitimate theoretical boundaries until it has swept away any vestige of "minimum contacts." And foreign businesses will be faced with a Hobson's choice of either having to self insure for the risk of suit in a remote forum for a market in which they never sought to partake, or attempt to convince a foreign insurer to indemnify them for a virtually unquantifiable event-coverage which, assuming it could be had and was procured, could be used against them to establish purposeful availment. The potential foreign relations fallout of the majority's expansive jurisdictional rule simply cannot be ignored in light of the increasingly politically and economically interconnected nature of the international community.

Beyond the systemic ills that need to be cured, it would be a travesty of justice in this individual case to subject L'Arciere to jurisdiction, and with it the rigors of proceeding through trial in a far removed foreign judicial system, solely to mollify Kopke's tenuous trial strategy concerns-especially in view of the dearth of evidence of purposeful availment.

For all of the reasons stated above, as well as those set forth by L'Arciere, this Court should grant L'Arciere's Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

SOCIETÀ COOPERATIVA L'ARCIERE,
Petitioner,

v.

TIMOTHY J. KOPKE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Wisconsin Supreme Court

RESPONDENT TIMOTHY J. KOPKE'S BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether the Wisconsin Supreme Court correctly applied the principles of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny to the facts and circumstances of this particular case?

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RESPONDENT TIMOTHY J. KOPKE'S BRIEF IN OPPOSITION

The Wisconsin Supreme Court upheld the Brown County Circuit Court's exercise of jurisdiction over petitioner Società Cooperativa L'Arciere ("L'Arciere") based on principles well-settled in the decisions of this Court. Specifically, the Court applied the minimum-contacts test as announced in the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and as refined in a subsequent series of cases, the most notable of which here are *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). This fact-driven test has been routinely used for decades by both state and federal courts across the Nation, which have derived considerable uncontroversial law from these decisions.

Petitioner, however, suggests that the Court should use this case to reopen the debate between Justice O'Connor's and

Justice Brennan's views of the so-called "stream of commerce" test, as reflected in the subsequent case of *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). But the separate opinions in *Asahi* only departed from one another with regard to Justice O'Connor's view that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* at 112. More fundamentally, all members of the Court in *Asahi* recognized that questions of personal jurisdiction require the application of *International Shoe*'s principles in the context of particular factual disputes—and it is with this broader aspect of the modern constitutional law of personal jurisdiction that petitioner must ultimately quarrel.

In any event, this case does not even remotely resemble *Asahi*. Here, a severely injured Wisconsin citizen is suing a foreign defendant whose actions are alleged to have directly caused his injury. The case is indistinguishable in its essence from *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), or any of scores of other cases upholding long-arm jurisdiction. Indeed, even the dissent here, upon which the petitioner places so much reliance, was quite explicit that this case does not turn upon the competing views set forth by different members of this Court in *Asahi*. *See, e.g.*, Pet. App. 36, 43.

In these circumstances, the petition raises nothing more than a dispute over the application—in a particular case with peculiar facts—of well-settled principles of personal jurisdiction as established in *International Shoe* and refined in cases such as *World-Wide Volkswagen*. Petitioner's request that this Court review the facts of this case for the propriety of those principles' application should be denied; Kopke's action against petitioner and the other defendants should be permitted to go to trial, as scheduled, in June 2002.

COUNTERSTATEMENT OF THE CASE

The fact-driven nature of the *International Shoe* test and petitioner's inadequate and argumentative statement of the case require this counterstatement of the case. In order to place the petition in context, it is necessary to set forth (1) the underlying events and commencement of this action, (2) the basis for jurisdiction as established in discovery, (3) the proceedings in the state courts on petitioner's request for dismissal for lack of personal jurisdiction, and (4) the portion of this case currently pending in the Wisconsin Court of Appeals.

1. Underlying Events and Commencement of Action. Respondent Timothy J. Kopke ("Kopke") suffered a severe spinal cord injury and was rendered a permanent quadriplegic on May 28, 1997, when he opened the door of a freight container shipped to Wisconsin from Italy. The inadequately secured contents (a pallet loaded with paper) fell out of the freight container and struck Kopke. Kopke thereafter commenced this action, initially naming as defendants Cartiere Binda in Liquidazione, S.p.A. ("Binda"), the entity that manufactured and shipped the freight, and A. Hartrodt S.R.L. ("Hartrodt"), which was subsequently dismissed as a defendant.[1]

In its answer, Binda raised as an affirmative defense the allegation that L'Arciere (i.e., petitioner here)—and not Binda—was the entity that had loaded, packed, placed, and secured the materials in the freight container and that Kopke thus had failed to sue the responsible entity. Binda produced the contract between it and petitioner for the processing of Binda's product into shipping containers.

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[1] Hartrodt was dismissed without objection from any of the parties when it became clear that the shipping documents erroneously named Hartrodt as the shipper.

Kopke thereupon amended his complaint to add petitioner as a defendant.[2] The basis for Kopke's claim against petitioner is the allegation that petitioner improperly positioned the palletized product within the freight container and inadequately secured the product. Specifically, the bracing boards which petitioner installed to secure the cargo from tipping were of insufficient strength and size to retain the palletized cargo during transit to Wisconsin. Further, as alleged by Binda, the boards were weakened by severe hammering and damage during the course of installation by petitioner. The result was the collapse of the cargo onto Kopke.

2. Basis for Jurisdiction as Established in Discovery. After Kopke's complaint thus naming petitioner as an additional defendant was filed, the parties conducted discovery on the question of the circuit court's jurisdiction over petitioner and on the merits of Kopke's claim. The documents produced and depositions taken in this discovery more precisely established the nature of petitioner's relationship with Binda in general and its actions with respect to the specific events underlying this case.[3]

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[2] Subsequently, Binda filed a third-party complaint within this case against Riunione Adriatica di Sicurtà S.p.A. ("RAS"), its insurer, and Kopke then amended his complaint to add a claim against RAS, in accordance with Wisconsin procedure. Petitioner L'Arciere filed a cross-complaint against Binda for contribution and/or indemnification. All of these claims were filed as part of the Brown County Circuit Court case commenced by Kopke and bear No. 98-CV-996 in the trial court.

[3] No evidentiary hearing on jurisdiction was held here. Rather, petitioner moved to dismiss for lack of jurisdiction, although its motion relied on matters outside the pleadings and thus was in the nature of a summary judgment motion. *See Wisconsin Conf. Bd. v. Culver*, 243 Wis. 2d 394, 402, 627 N.W.2d 469, 474 (2001). In these circumstances, the evidence must be viewed in the light most favorable to Kopke, the non-moving party, and all reasonable inferences drawn in his favor. *See*

Binda and petitioner entered into an exclusive contract in 1995 under which petitioner supplied workers to load Binda's product (paper) into cargo containers and to secure the containers. This included product that Binda wished to ship to Wisconsin for delivery to CTI Paper USA, Inc. ("CTI"). CTI's and Binda's relationship was even more long-standing than Binda's and petitioner's, as CTI had been purchasing paper from Binda since 1991.

It is undisputed that, as part of its contract with Binda, petitioner loaded at least 45 containers for shipment to CTI in Wisconsin. Thirty-nine of these arrived during the period of November 1996 to May 1997, when Kopke was injured. It is not currently known how many more containers were packed by petitioner and shipped to Wisconsin: the documents identifying the 45 containers relate only to containers in which the cargo had shifted, tipped, or otherwise moved, causing damage to the cargo. This resulted in a report—"RECEIVING DAMAGE REPORT"—which CTI immediately faxed to Binda for each container with damaged cargo. The number of containers that did not result in damaged cargo is not reflected in any available documents.

Petitioner had specific duties with regard to the loading of containers for shipment. Petitioner's workers would follow loading plans separately prepared by Binda for each container and would move the pallets of paper into the cargo container. They would then secure the pallets using boards, bracing beams, and inflated air bags to fill side spaces. Petitioner would alert Binda concerning any problems it encountered in loading pallets.

Burkes v. Klauser, 185 Wis. 2d 308, 328, 517 N.W.2d 503, 511 (1998); *compare Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). This principle applies fully in the personal-jurisdiction context. *See, e.g., American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1169 (6th Cir. 1988).

The loading plans which Binda provided to petitioner clearly indicated that each of these containers was being shipped to CTI. For example, Binda produced in discovery loading plans for five of the shipments that occurred between November 1996 and May 1997. At the top of each of these plans are written such things as "Contenitore X CTI Neenah" and "Cont. X CTI Appleton." "Contenitore" (or as abbreviated "Cont.") is an Italian word meaning "container," and "X" is an abbreviation for "per," which means "to." Binda's witness testified at deposition that *every* loading plan for shipment of product to CTI contained notations identifying the product as being shipped to CTI and identified Wisconsin cities such as Neenah or Appleton.

Finally, it is undisputed that, as part of its contract with Binda, petitioner physically loaded and secured the product and the containers that caused Kopke's injuries.

3. Proceedings in Court on Petitioner's Request for Dismissal. a. On November 19, 1999, the Brown County Circuit Court (William M. Atkinson, J.) denied petitioner's motion to dismiss for lack of personal jurisdiction. The circuit court concluded that petitioner's activities were sufficient under both Wisconsin's long-arm statute and the requirements of due process to permit jurisdiction over petitioner in Wisconsin.

b. Petitioner thereupon requested interlocutory review in the Wisconsin appellate system of the circuit court's non-final order denying its motion to dismiss. The Wisconsin Court of Appeals granted petitioner's request and certified the case to the Wisconsin Supreme Court.

The Wisconsin Supreme Court affirmed. As an initial matter, the court concluded that Wisconsin's long-arm statute was satisfied. Specifically, the court considered the "local injury, foreign act" provision in Wisconsin law. This statute grants jurisdiction over any action involving an in-state injury "arising out of an act or omission outside this state by the

defendant," provided that "[p]roducts, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade." Wis. Stat. § 801.05(4)(b). Relying upon a Seventh Circuit decision interpreting Wisconsin law, the court concluded that the word "process[ing]" in the statute encompassed the concept of "'subjecting something to a particular system of handling to effect a particular result and preparing something for market or other commercial use by subjecting it to a process.'" Pet. App. 6-7 (quoting *Nelson by Carson v. Park Indus., Inc.*, 717 F.2d 1120, 1124 n.5 (7th Cir. 1983)). On this basis, the Wisconsin court held that petitioner's activities of loading, arranging, and securing Binda's paper constituted "processing" and brought petitioner within the long-arm statute. *See* Pet. App. 11-12.

The Wisconsin Supreme Court then held that this exercise of jurisdiction over petitioner was consistent with the Due Process Clause. The court inquired first whether petitioner had the requisite minimum contacts with Wisconsin. The court specifically relied on this Court's decisions in *World-Wide Volkswagen* and *Burger King*, highlighting the following statement by this Court:

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others. *The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Cf. Gray*

v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

World-Wide Volkswagen, 444 U.S. at 297-98, *quoted in* Pet. App. 16 (emphasis supplied here). The Wisconsin court acknowledged a disagreement in this Court's various opinions in the subsequent *Asahi* case over the precise scope of this stream-of-commerce basis for personal jurisdiction. While the state court preferred Justice Brennan's formulation in *Asahi*, *see* Pet. App. 19, it also noted that even Justice O'Connor's opinion indicated that foreseeability plays a role in personal-jurisdiction analysis under *World-Wide Volkswagen*, *see* Pet. App. 17. Ultimately, the Wisconsin Supreme Court determined to apply "the stream of commerce analysis of *Burger King* and *World-Wide Volkswagen*." Pet. App. 20.

The court then went about "applying that test to the present case." Pet. App. 21. This required a fact-intensive review of petitioner's actions. The court discussed the following at some length: (1) "the nature of the contractual relationship between [petitioner] and Binda," in which each company's "employees worked together . . . to load the cargo containers," and petitioner's alleged negligence "in the manner in which it loaded the cargo container, [thereby] caus[ing] or contribut[ing] to causing [Kopke's] injuries"; (2) "the loading instructions prepared by Binda and used by [petitioner] L'Arciere, [which] identified the container's destination as 'Neenah' or 'CTI Appleton,'" all of which meant that "these products did not arrive randomly or fortuitously in Wisconsin [but] were specifically intended to arrive in this forum"; and (3) "the damage reports prepared by CTI on cargo containers received from Binda between November 8, 1996, and May 20, 1997, [which] demonstrate that at least 40 containers were loaded by [petitioner's] workers for delivery in this forum." Pet. App. 21-22.

The court concluded the minimum-contacts analysis by explaining that petitioner benefited from the distribution of

Binda products in Wisconsin. *See* Pet. App. 22. More than that, "L'Arciere literally 'played a hand' in the product arriving in this state," and, indeed, its "handling of the final product is the alleged act of negligence that may have caused Kopke's injuries." *Id.* Based on all these circumstances, the Wisconsin Supreme Court found it "reasonable to conclude that the purposeful availment requirement is met and that L'Arciere has sufficient minimum contacts with this forum to be held accountable here if any negligence on its part in loading the cargo containers has resulted in damages." *Id.*

Having found that minimum contacts were established, the court turned next "to a consideration of the second inquiry for personal jurisdiction, application of the standard of fair play and substantial justice." Pet. App. 24. Looking to factors identified as relevant in *Asahi* and *World-Wide Volkswagen*, the Court found the first two factors to be strongly present here. First, "the State of Wisconsin has an unquestionable interest in providing its citizenry with a forum to adjudicate claims arising here" (unlike, say, in *Asahi*, where the remaining dispute was between two foreign nationals). Pet. App. 24. Second, "Kopke, who suffered a spinal cord injury causing permanent quadriplegia, has an undeniable interest in obtaining convenient relief." *Id.*

The third factor considered by the court—and the one it discussed at the greatest length—is "the burden on the defendant." Pet. App. 25; *see id.* at 25-28. The court squarely confronted petitioner's contention "that it would be unfair and unjust to exercise personal jurisdiction over a party that merely packs or loads goods onto a truck or vessel," as well as petitioner's "view [that] subjecting [it] to jurisdiction in this forum would subject all packing and portage companies, stevedores, and longshoremen to nationwide, even worldwide, jurisdiction." Pet. App. 25. The court explained that the latter was not the import of its decision and that several decisions relied on by petitioner below (which

were, in any event, decided on minimum-contacts as opposed to fundamental-fairness grounds) did not indicate an absence of jurisdiction here:

> In the case at hand, the cargo container's arrival in Wisconsin was not "merely fortuitous" as was the passage of goods through Miami in [a Florida case cited and discussed] or, arguably, the docking of a vessel in Seattle in [a Washington case]. The goods were purchased by CTI and intended for delivery in this forum; the goods did not fortuitously, randomly, or even erringly appear here. In contrast to the events in [a Minnesota case cited and discussed], this was not a one-time transaction. CTI had been purchasing Binda's products since 1991; [petitioner] L'Arciere was loading cargo containers under contract with Binda from 1996 through May of 1998. During this period, numerous cargo containers were packed by L'Arciere, destined for Wisconsin. Thus, we conclude that L'Arciere was not an anonymous entity packing goods for shipment somewhere in the global economy.

Pet. App. 27-28. The court thus concluded that, in order to be successful within the context of this case, petitioner's argument necessarily reduced to a contention that "a nonresident, unconsenting business entity engaged in loading or stowing goods will always avoid personal jurisdiction because it is unfair or unreasonable." Pet. App. 28. The court "decline[d] to adopt [such a] 'per se' analysis offered by L'Arciere." *Id.*

Finally, the court rejected petitioner's attempt to fit this case within the facts of *Asahi*. The court explained that one important feature "distinguish[ing] *Asahi* from the case at hand is that in *Asahi*, the injured plaintiff, a California resident, was no longer a part of the action, having reached a settlement agreement." *Id.* Here, by contrast, "Kopke [a Wisconsin resident] is still a party, and very interested." Pet.

App. 28-29. The court further explained that *Asahi* is "substantially different from the present case" in other important details as well, in particular in that the present case does not involve a "sale of goods scenario" analogous to *Asahi*, where the Court rejected personal jurisdiction over a foreign national that had sold its product to another foreign national that subsequently incorporated that product into a product that was sold in California. Pet. App. 29.

c. Justice Crooks, joined by two other justices, dissented.[4] He took issue "particularly" with a statement early in the majority's personal-jurisdiction analysis that "'compliance with the long-arm statute *presumes* that due process is met.'" Pet. App. 30 (quoting Pet. App. 13, which itself cites *Lincoln v. Seawright*, 104 Wis. 2d 4, 10, 310 N.W.2d 596, 599 (1981)) (emphasis added by dissent). Justice Crooks found such a presumption to be "a grievous error that should not be continued." Pet. App. 31.

Second, Justice Crooks considered the state of the purposeful-availment requirement, recounting the difference between Justice O'Connor's and Justice Brennan's views. Pet. App. 32-33; *see supra* p. 8. The dissenting justice noted the majority's preference for Justice Brennan's formulation, but stated that his view here did not turn on which *Asahi* formulation was selected. Rather, according to the dissent, it was enough to preclude jurisdiction (under any view of *Asahi*) that there was no explicit evidence that petitioner "knew specifically that some [shipments it packed] were destined for Wisconsin." Pet. App. 36. Of course, shipments were marked with such things as "Cont. X CTI Appleton"

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[4] A separate dissent of the same justices concerned the meaning of Wisconsin's long-arm statute, *see* Pet. App. 43-45, and thus is not implicated here.

and "Contenitore X CTI Neenah," to which fact the dissent responded thus:

> There are no less [*sic*] than three Neenahs in the United States (one apiece in Alabama, Virginia, and Wisconsin); two dozens Appletons within and without the United States; and literally hundreds of locations around the world where one may find corporations in whose name the letters "CTI" play a prominent part.

Pet. App. 37. The dissent acknowledged a series of cases where courts had found that defendants could be presumed to know the destination of products; these include *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610 (8th Cir. 1994), where the court upheld jurisdiction in Nebraska over a Japanese fireworks company that did not itself ship its products to or distribute them in the state, *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980), which sustained jurisdiction on the grounds that the defendant should have known that its products would be marketed and sold in the forum state, and *Giotis v. Apollo of the Ozarks, Inc.*, 800 F.2d 660 (7th Cir. 1986), where jurisdiction was permitted in Wisconsin over a Missouri defendant that was part of a distribution network. *See* Pet. App. 37-39 & n.5. The dissent sought to distinguish this line of cases on the ground that in the instant case, as the dissent saw it, nothing would have given petitioner "reason to believe that . . . the paper it packed would end up in Wisconsin [i.e., a specific state]." Pet. App. 39.

Finally, the dissent concluded that "the majority is creating a minimum contacts test based upon foreseeability"—an "approach [that] was plainly rejected by the United States Supreme Court in *World-Wide Volkswagen*." Pet. App. 41. The dissent noted that "[t]here, the Court held that jurisdiction in Oklahoma cannot be based upon 'the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident

while passing through Oklahoma . . . .'" *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 295). The dissent contended that this case was similar. *See* Pet. App. 41-42.

4. Related Aspects of this Case Pending in the Wisconsin Court System. As previously noted, this action in the Brown County Circuit Court has occasioned, among other things, a third-party complaint by Binda impleading RAS, its insurer, into this case. *See supra* p. 4 n.2. Because RAS has sought to support the petition for certiorari "[g]iven [its] potential" to assist RAS in the portion of this case still pending in the Wisconsin appellate system (RAS Brief in Support, p. 1), it is appropriate to recount the procedural history and current status of the Binda-RAS dispute.

Binda's third-party complaint against RAS seeks a ruling concerning its insurance coverage for any liability that it may have to Kopke. RAS moved to dismiss Binda's third-party complaint based on, among other things, lack of personal jurisdiction over RAS in Wisconsin. Following discovery, Judge Atkinson concluded in the fall of 2000 that there was no personal jurisdiction over RAS in Wisconsin and accordingly granted RAS's motion to dismiss Binda's third-party complaint. Binda filed an appeal of this decision in the Wisconsin system. That appeal (*Kopke v. A. Hartrodt S.R.L.*, Wis. App. No. 00-3008) is currently pending in the Wisconsin Court of Appeals, District III.

REASONS FOR DENYING THE PETITION

The Wisconsin Supreme Court applied this Court's long-standing personal-jurisdiction precedents—most notable among which for this case is *World-Wide Volkswagen, Inc. v. Woodson*, 444 U.S. 286 (1980)—in deciding that it is constitutionally permissible for petitioner to be subject to civil process in this action. These cases establish that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation

that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98. Petitioner here essentially stands in the shoes of such a corporation: (1) While it did not own the products in question, it played an indispensable and ultimate role in delivering them into the stream of commerce—i.e., in loading, arranging, and "securing" (the last term must be used loosely, given what happened to Kopke) Binda's paper in the shipments to Wisconsin; (2) It performed this role as part of a long-term and exclusive contract with Binda; and (3) It acted pursuant to plans (and in a context, *viz.*, shipping) that gave it notice that the purpose of its activities was to serve as a final step in enabling the products in question to be shipped to CTI in such places as "Appleton" and "Neenah."

In this legal and factual context, petitioner does not specify the rule of law it seeks applied to this case. To the extent that (as the Wisconsin Supreme Court suggested) petitioner seeks a per se rule—such as one that would proscribe jurisdiction under the stream-of-commerce approach unless the forum state's name was squarely marked on shipments (e.g., "Appleton, Wisconsin" rather than just "Appleton") or perhaps even proscribe jurisdiction over anyone but the *owner* of a product being delivered into the stream of commerce—it is sufficient to note that no such per se rule can be maintained under the multifactor test that dominates the modern constitutional law of personal jurisdiction. To the extent that petitioner does not wish any such per se rule—and is merely seeking examination of the Wisconsin Supreme Court's application of existing *International Shoe* factors to this particular case—that request does not warrant this Court's review. Thus, in either event, the petition should be denied.

I. CONTRARY TO PETITIONER'S CLAIM OF "SUBSTANTIAL CONFUSION," THE TEST APPLIED HERE DERIVES FROM *INTERNATIONAL SHOE*, WAS SPECIFICALLY RECOGNIZED AND SANCTIONED IN *WORLD-WIDE VOLKSWAGEN*, AND IS ROUTINELY APPLIED IN OTHER CASES, ACCORDING TO THE FACTS OF EACH.

The basic constitutional contours of personal jurisdiction are well-established in the precedents of this Court. The essential element is that a defendant may be the subject of civil process in a state if it has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). As this Court has repeatedly recognized, this test requires consideration of the facts and context of each individual case. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). The *International Shoe* test thus repudiates the formalistic requirements that previously made up the constitutional law of personal jurisdiction,[5] *see Pennoyer v. Neff*, 95 U.S. 714 (1877), and it does so for reasons identified by this Court:

> As technological progress has increased the flow of commerce between the States, the need for jurisdiction

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[5] This is true except perhaps in the narrow context of in-state service. *See Burnham v. Superior Ct.*, 495 U.S. 604, 607 (1990) (opinion of Scalia, J.) (in-state service necessarily suffices for personal jurisdiction and in that context no multifactor balancing test is required). *But cf. id.* at 629 (opinion of Brennan, J.) ("'*all* assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny'") (quoting *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977)).

> over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer v. Neff*, 95 U.S. 714, to the flexible standard of *International Shoe Co. v. Washington*, 326 U.S. 310.

Hanson v. Denckla, 357 U.S. 235, 250-51 (1958).

The Wisconsin Supreme Court here did nothing other than apply the *International Shoe* test to the facts of this particular dispute. Nor was it left to do so without direction about how such application should play out in the context of a corporation whose contact with the forum state is that products that the corporation sent into the stream of commerce have reached the state. At least since the famous case of *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961), courts have confronted the question of how to apply the *International Shoe* test in a modern economy where products manufactured in one forum are then shipped to another forum. Courts have thus articulated the so-called stream-of-commerce doctrine, which has not only general grounding in *International Shoe* but specific roots in subsequent decisions of this Court.[6] This Court specifically approved this line of cases in *World-Wide Volkswagen*, stating that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into

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[6] *See Gray*, 22 Ill. 2d at 439, 176 N.E.2d at 764 (discussing and quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957), which though not itself a stream-of-commerce case recognized that, while "defendant had no office or agent in California nor did it solicit any business there apart from the policy sued on . . . , 'it is sufficient for purposes of due process that the suit was based on a *contract* which had substantial connection' with California") (emphasis added by *Gray* court).

the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 422 U.S. at 297-98 (citing *Gray*).

Viewed against this backdrop, the Wisconsin Supreme Court's decision is properly seen as a particular application of long-standing constitutional principles to the facts and circumstances of petitioner's actions here. That of course is the reason that these matters are recounted above in some detail. *See supra* pp. 3-6, 8-11. While it is therefore not necessary to recount those facts and circumstances in similar detail again, it should be noted that they include the following: First, petitioner played an indispensable and ultimate role in effecting the delivery of the products in this case not merely into the stream of commerce but into the forum state. Petitioner loaded, arranged, and "secured" the paper in the pallets in order for the product thereupon to be shipped immediately and directly to Wisconsin. Second, the product's arrival in the forum state was not some fortuitous or random event: petitioner undertook the actions that allegedly resulted in Kopke's severe injuries (and thus form the basis of this action) as part of a long-term and exclusive contract with Binda. Thus petitioner previously had similarly processed more than 40 other such deliveries to Wisconsin—and that number includes only those deliveries as to which the recipient registered a complaint because they arrived in Wisconsin in damaged condition. Third, petitioner worked directly with the owner of the product, Binda, and did so pursuant to written plans and in a context (that of shipping) that gave petitioner explicit notice that it was processing product for immediate delivery to "CTI" in "Appleton" and "Neenah."

To be sure, the specific facts of this case are not precisely those of *World-Wide Volkswagen* or *Burger King*—any more than those of *World-Wide Volkswagen* or *Burger King* were precisely those of *Gray*, or those of *Gray* were precisely those

of *McGee*, *see supra* p. 16 n.6, or those of *McGee* were precisely those of *International Shoe*. For example, petitioner did not own the products in question, as did the entities in question in various other cases, but rather was a contractor working alongside the owner (Binda). But ownership of products has never been suggested to be a *sine qua non* of personal jurisdiction.[7] What matters rather is the "quality and nature" of petitioner's actions, *Burger King Corp.*, 471 U.S. at 486, and it is upon these matters that the Wisconsin Supreme Court properly focused. This ability to accommodate new fact scenarios is among the values of the *International Shoe* test—it permits a flexible, fact-driven analysis of personal-jurisdiction questions. And surely it is *this* quality of existing doctrine—and not some refusal to provide guidance, as petitioner repeatedly suggests, *see* Pet. 5-6, 10, 18—that has guided the extent of the Court's *International Shoe* docket.

Given the contextual inquiry required under *International Shoe* and engaged in by the Wisconsin Supreme Court here, it is not surprising that there was a difference of opinion in the Wisconsin Supreme Court over application of the test to the particular facts here (after all, even *World-Wide Volkswagen* prompted a dissent, *see* 422 U.S. at 299 (Brennan, J., dissenting)) or even that the dissenting justices below called for this case to be reviewed by this Court. Absolute certainty of result, to be sure, is not the hallmark of balancing tests (and it would be the rare judge who lost a debate about a particular application of a balancing test and did not want the decision reviewed). But unless this Court wishes to revisit *International Shoe*'s basic teaching that a defendant may be

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[7] This is especially so because in economic terms the distinction frequently has no substance. *See* Frank Easterbrook & Richard Posner, *Antitrust* 869 (2d ed. 1981) ("anything that can be accomplished by ownership" of two firms "also can be accomplished by a properly drawn contract" between the two firms).

subject to process in a state if it has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice,'" 326 U.S. at 316, the occasional disagreement in application of the *International Shoe* test to particular facts is inevitable and does not warrant this Court's review.

Nor does this case present some fundamental question about rival formulations of the stream-of-commerce doctrine as set forth in *Asahi*, as petitioner suggests. *See* Pet. 6-13. As even the dissent recognized here, *see supra* pp. 2, 11, the proper result in this case does not turn on the difference of opinion in *Asahi* between Justice O'Connor, who would require something more than "a defendant's mere awareness that the stream of commerce 'may or will sweep the product into the forum State,'" Pet. 9 (quoting 480 U.S. at 112), and Justice Brennan, who required "no showing of 'additional conduct'" provided that "a [defendant] is aware that the final product is being marketed in the forum State," *id.* (quoting 480 U.S. at 117). This is the case for two reasons.

First, as a factual matter here (and one that is dispositive of petitioner's argument), this case does not involve "mere awareness" on petitioner's part about where the "stream of commerce" may or might "sweep" the container. It involves at least constructive knowledge—a concept well-recognized in the caselaw, as reflected in both the majority (*see* Pet. App. 23-24) and dissenting (*see supra* p. 12) opinions here [8]—of

[8] *See, e.g.*, *Barone*, 25 F.3d at 613 n.4 ("The traditional equivalence between 'know' and 'should have known' in our jurisprudence suggests that, for purposes relevant to this case, it is a distinction that makes no difference. The ultimate test of in personam jurisdiction is 'reasonableness' and 'fairness' and 'traditional notions of fair play and substantial justice' [citation omitted]. In applying such a test, it is a matter of common sense that there should be no distinction between 'know' and 'should have known.' We cannot say that a potential defendant who

the *immediate* destination of the pallets that petitioner and Binda together were packing (as opposed to say, some destination to which someone in Wisconsin might himself forward the product) *and further* involves conduct, already recounted, designed to be a final act in effecting such a result. Thus, under either Justice O'Connor's or Justice Brennan's view in *Asahi*, personal jurisdiction over petitioner is permissible.

Second, as a legal matter, and as stated in yet another opinion in *Asahi*, it is not clear that it is possible to draw an "unwavering line" between "'mere awareness' that a component will find its way into the forum State and 'purposeful availment' of the forum's market." *Asahi*, 480 U.S. at 122 (Stevens, J., concurring). For this reason, it is not surprising that, in petitioner's words, "state court decisions which grapple with the stream of commerce doctrine [are] difficult to summarize" (Pet. 10) or that "the majority" of courts "have declined to adopt any specific formulation, choosing to resolve each case 'on the facts,'" and have thus been able to "avoi[d] choosing" between Justice O'Connor's and Justice Brennan's formulations (Pet. 10-11). In addition (and again in petitioner's words), among the "[v]arious conceptual solutions [that] have been proposed" in numerous law review articles, there has emerged "no consensus" as to some preferable alternative to existing law. Pet. 12. In short, while it is appropriate for academics to "call for international

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actually knows his products will ultimately reach the forum state any more 'purposefully avails itself of the privilege of conducting activities [there]', [citation omitted], than a potential defendant who merely *should have known*.") (quoting *Oswalt*, 616 F.2d at 200-01). Even the dissent below did not question this analysis in *Barone*, *compare* Pet. App. 23 (majority's discussion of case) *with* Pet. App. 37-38 (dissent's discussion), although it attempted to argue that *Barone* was "inapposite" (Pet. 37) and involved a type of constructive knowledge that was somehow different from that here, *see* Pet. 39.

standards," to "propos[e] legislative solution[s]," and to "analyz[e] jurisdiction under liberal and communitarian approaches" (Pet. 12), this scarcely demonstrates that a "chaotic patchwork of approaches to personal jurisdiction" is applied *by the courts*, as petitioner maintains (Pet. 13). Rather, courts have found adequate guidance in the basic prescriptions set forth in *International Shoe* and its progeny to enable them to engage in the fact-specific inquiry required in modern personal-jurisdiction law. Petitioner's disagreement with the result of that inquiry in this particular case does not mean that the Wisconsin Supreme Court's contextual application of this Court's precedents warrants review by this Court.

II. PETITIONER'S OTHER CRITICISMS OF THE DECISION BELOW DO NOT JUSTIFY REVIEW.

Petitioner maintains as separate arguments that the Wisconsin Supreme Court's decision should be reviewed because it sanctioned jurisdiction based on "mere foreseeability that products handled by defendants would make their way into the forum state" (Pet. 13-16) and that review is important to ensure "stable international relations" and to protect "our citizens" from "foreign courts" (Pet. 16-18).[9]

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[9] Petitioner properly places no reliance on the point that most animated the dissent in this case—*viz.*, the "majority['s] state[ment] that 'compliance with the [long-arm] statute *presumes* that due process is met.'" Pet. App. 30 (Crooks, J., dissenting) (quoting Pet. App. 13) (emphasis in dissent). This is so for two reasons. First, notwithstanding this statement, the court's opinion does not rely on this (or any other) presumption in its analysis, instead finding, for example, that "Kopke has met his burden to establish . . . personal jurisdiction over [petitioner]." Pet. App. 24. Second, and more fundamentally, notwithstanding the dissent's believing the majority's statement to be "grievous error" (Pet. App. 31), it is in fact an unremarkable context-specific recognition of the fact that the Wisconsin legislature should be *presumed* to have written

The former contention is simply false, as demonstrated in the foregoing section. In fact, the Wisconsin Supreme Court engaged in a fact-intensive scrutiny of the nature and extent of petitioner's contacts with Wisconsin and concluded, for the variety of reasons explained above, that this was not a case where a defendant's contact with the forum state was merely that the defendant should have been able to foresee that a product with which it was associated might someday arrive there. *See supra* pp. 8-11, 14, 17 (recounting and analyzing petitioner's contacts with Wisconsin as summarized by the Wisconsin Supreme Court). In these circumstances, it is not necessary to reiterate that explanation here. It should nonetheless be noted that petitioner has correctly decided not to repeat its overreaching argument that "subjecting [petitioner] to jurisdiction in this forum would subject all packing and portage companies, stevedores, and longshoremen to nationwide, even worldwide, jurisdiction." Pet. App. 25. As the Wisconsin Supreme Court's analysis demonstrates, this case establishes only that a processing company such as petitioner, with a long-term exclusive contract with a manufacturer and shipper such as Binda that requires the company to work alongside that other entity and

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a constitutional long-arm statute, just as other statutes are presumed constitutional.

Respondent RAS's essay (RAS Brief in Support, pp. 13-16) concerning the "real" reason Kopke wishes to maintain this action against petitioner also warrants brief comment. Kopke amended his complaint to add petitioner as a defendant when Binda denied responsibility for Kopke's injury. *See supra* pp. 3-4. Kopke can scarcely be criticized for "want[ing] to keep . . . in this case" (RAS Brief in Support, p. 16) the entity that RAS's insured has blamed for rendering Kopke a quadriplegic. RAS's essay loses sight of two matters: first, that recovery for injured persons from legally responsible entities is the purpose of the substantive law of torts, and second, that pleading in the alternative is an acceptable mode of procedure, *see, e.g.*, Wis. Stat. § 802.05(b); Fed. R. Civ. P 8(e)(2).

to engage in repeated acts of packaging and processing materials about to be shipped immediately and directly to the same forum (whose cities are marked on the loading instructions), may be made to answer in that forum for its alleged torts in connection with one of its acts. This is not "mere foreseeability," as petitioner maintains (Pet. 13); nor is it, as the dissent maintains, analogous to the situation proscribed in *World-Wide Volkswagen*—i.e., "'the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.'" Pet. App. 41 (quoting 444 U.S. at 295).

As for the latter contention, that concerning comity and international relations, petitioner fails adequately to appreciate that the inquiry into whether personal jurisdiction is "reasonable" in a particular case, as mandated by this Court, *see Asahi*, 480 U.S. at 113; *World-Wide Volkswagen*, 444 U.S. at 292, provides ample basis for the courts of this Nation to eschew exercises of jurisdiction where doing so is necessary for "stable international relations" (Pet. 16), provided that this interest is not outweighed by others in the balancing test that any reasonableness inquiry requires.[10]

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[10] Petitioner L'Arciere's assertion (Pet. 17) that it is necessary to reject jurisdiction in this case to protect "our citizens" from foreign courts overlooks two basic principles. The first (a policy principle) is that, to the extent that American citizens have caused injuries in other nations, the United States has no interest in frustrating efforts to hold them accountable. The second (a legal principle) is that ample protection from overreaching against American citizens can be found in the basic guarantee afforded to its citizens by every State in this Nation (and applicable in federal court as well, *see* Fed. R. Civ. P. 69(a)) against the enforcement of foreign judgments that do not comport with essential elements of due process. *See generally* Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 Brooklyn J. Int'l L. 167, 173-78 (1998) (summarizing existing statutory and common law on enforcement of foreign judgments).

In these circumstances, petitioner's request for "coherent principles" (Pet. 17) is somewhat elusive, as petitioner offers no hint as to what these principles might be or under what circumstances they should trump the long-standing *International Shoe* framework. Thus, unless petitioner is seeking some per se exclusion from personal jurisdiction for foreign companies, the answer here, too, must be that this Court's precedents already afford the opportunity for thorough consideration of all the facts and circumstances of each defendant's contacts with the forum state—including the defendant's status, in appropriate cases, as a foreign entity. More than this, the Due Process Clause has not been thought to require since the *International Shoe* decision in 1945.

CONCLUSION

The petition should be denied and Kopke's action should be permitted to go to trial, as scheduled, on June 17, 2002.

Respectfully submitted,

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